(24,927)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 644.

L. LAWRENCE WEBER, APPELLANT,

vs.

FREDERICK S. FREED, DEPUTY COLLECTOR OF UNITED STATES CUSTOMS IN CHARGE OF THE PORT OF NEWARK, N. J.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

INDEX.

	Original.	Print
Docket entries	1	1
Bill of complaint	3	1
Motion to dismiss complaint	14	8
Final decree	15	9
Assignment of errors	17	10
Petition for appeal	20	11
Order allowing appeal	21	12
Bond on appeal	22	12
Citation and service	25	16
Clerk's certificate	27	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1915.

1 United States District Court, District of New Jersey.

L. LAWRENCE WEBER
vs.
FREDERICK S. FREED, Deputy Collector, &c.

Docket Entries.

Apr. 27, 1915.	Bill filed.
	Affidavit and Order to Show Cause for injunction filed.
	Subpœna issued.
Apr. 28, 1915.	Subpœna returned, served April 27, and filed.
Apr. 30, 1915.	Hearing on order to show cause why preliminary injunction should not issue. Decision reserved.
May 6, 1915.	Memorandum filed.
	Interlocutory order denying motion for injunction filed.
	Assignment of errors filed.
	Petition of appeal and allowance filed.
	Bond on Appeal filed.
	Citation issued.
May 7, 1915.	Citation returned service acknowledged.
	Copy filed.
May 8, 1915.	Transcript forwarded to U. S. Circuit Court of Appeals.
May 17, 1915.	Motion to dismiss bill filed.
Aug. 21, 1915.	Mandate of U. S. Circuit Court of Appeals confirming decree of this court, with costs to defendant.
Sep. 7, 1915.	Final Decree dismissing bill filed.
	Assignment of Errors filed.

2

Sep. 7, 1915.	Petition and order allowing appeal filed.
	Bond on appeal filed.
	Citation issued. Copy filed.
	Affidavit of service filed.

3 *Bill of Complaint.*

United States District Court for the District of New Jersey.

L. LAWRENCE WEBER, Complainant,
against
FREDERICK S. FREED, Deputy Collector of United States Customs in Charge of the Port of Newark, New Jersey, Defendant.

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

L. Lawrence Weber, a citizen and resident of the State of New York, presents this, his bill of complaint, against Frederick S. Freed,

Deputy Collector of United States Customs in charge of the Port of Newark, State of New Jersey, a citizen and resident of the State of New Jersey.

Whereupon your orator, complaining of the defendant herein, says:

First. That your orator now is, and for many years last past has been the owner, lessee and manager of a number of theatres and places of amusement in the United States, and now is, and for many years last past has been engaged in theatrical productions and in managing theatrical performers and artists of world-wide repute, and now is, and for many years last past has been engaged in furnishing amusement and entertainment to the public.

Second. That on or about the 5th day of April, 1915, at the City of Havana, in the Republic of Cuba, one Jess Willard and
4 one Jack Johnson engaged in a pugilistic contest for the title of heavy-weight champion of the world, the said Johnson being then the holder of said title. That under and pursuant to certain contracts in writing duly executed by all the parties who had the right to grant the same, your orator, for a valuable consideration, was granted the exclusive right to take moving pictures of the said contest for the purpose of publicly exhibiting the same. That pursuant to said right, your orator caused to be taken moving pictures of the said contest at an expense of many thousands of dollars.

Third. That the films so taken and developed are perfect, exact and clear reproductions of the said contest, and represent the highest type of the moving picture art, and are therefore of great value, as will hereafter more fully appear.

Fourth. That your orator has caused photographic film positives to be made from the negatives of said pictures, at an expense of many thousands of dollars, for the purpose of publicly exhibiting the same in the United States, under his personal management, control and supervision, and not for the purpose of traffic, sale or commerce.

Fifth. That the net profit from the exhibition of the said pictures in the United States, if promptly exhibited, will be from one-half of a million to two million dollars.

Sixth. That on July 31, 1912, the following act of Congress, known as Section 10416 of the United States Compiled Statutes, and as chapter 263, § 1, making "Transportation or importation of prize-fight films, etc., unlawful," became a law of the United States:

"It shall be unlawful for any person to deposit or cause to be deposited in the United States mails for mailing or delivery, or to deposit or cause to be deposited with any express company or other common carrier for carriage, or to send or carry from one State or Territory of the United States or the District of Columbia to
5 any other State or Territory of the United States or the District of Columbia, or to bring or cause to be brought into the United States from abroad, any film or other pictorial representation of any prize-fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition."

Seventh. That by an act of Congress, known as Section 10418

of the United States Compiled Statutes, being chapter 263, § 3, which became a law on July 31, 1912, it was provided that any person violating the law referred to in paragraph "Sixth" of this bill of complaint, shall "for each offense, upon conviction thereof, be fined not more than one thousand dollars or sentenced to imprisonment at hard labor for not more than one year, or both, at the discretion of the Court."

Eighth. That the said Act of Congress referred to in paragraph "Sixth" of this bill of complaint, and the said Act of Congress referred to in paragraph "Seventh" of this bill of complaint prescribing the punishment for the violation of the act referred to in paragraph "Sixth" of this bill of complaint, are unconstitutional.

Ninth. That in enacting the aforesaid legislation Congress exceeded its designated powers under the Constitution of the United States and attempted, under the guise of its powers under the Commerce Clause, to exercise police power expressly reserved in the States.

Tenth. That the defendant is the Deputy Collector of the United States Customs in charge of the Port of Newark, in the State of New Jersey, and within the jurisdiction of this Court.

Eleventh. That the duty to be paid to the United States Government on the importation into the United States of photographic-film positives is prescribed in Section 380 of the Tariff Act of October 3, 1913, as follows:

"Photographic-film positives, imported in any form, for use in any way in connection with moving-picture exhibits, including herein all moving, motion, motophotography or cinema-
6 tography film pictures, prints, positives or duplicates of every kind and nature, and of whatever substance made, one cent per linear or running foot."

The said Section also contains the following:

"Provided, however, That all photographic-films imported under this section shall be subject to such censorship as may be imposed by the Secretary of the Treasury."

Your orator says that the "censorship" referred to has never been "imposed" by the Secretary of the Treasury.

Twelfth. That on the 26th day of April, 1915, at the City of Newark, State of New Jersey, your orator, who was then and now is the owner of the photographic-films of the aforesaid contest between Jess Willard and Jack Johnson, demanded of the defendant the right to enter in the United States Customs, at the Port of entry in the City of Newark, State of New Jersey, photographic-film positives of the said contest on payment by him of the duties prescribed by law. That your orator stated to the said defendant that his object in importing the said photographic-film positives was for the purpose of publicly exhibiting the same in the United States under his personal management, control and supervision, and not for the purpose of traffic, sale or commerce. That the defendant refused to grant the request of your orator to enter and import the said photographic-film positives. That at the aforesaid time and place, to wit: on April 26th, 1915, at the City of Newark, in the State of New

Jersey, your orator also made the said demand of the defendant in writing, which your orator signed, as follows:

CITY OF NEWARK,
STATE OF NEW JERSEY, April 26th, 1915.

Hon. Frederick S. Freed, Deputy Collector of U. S. Customs in charge of Port of Newark, N. J.

SIR: The undersigned, the owner of certain protographic-film positives for use in connection with moving-picture exhibits,
7 and designed to be used for the purpose of public exhibition, of a certain encounter of pugilists namely: Jess Willard and Jack Johnson, held at the City of Havanna, in the Republic of Cuba, on the 5th day of April, 1915, hereby demands the right to enter through the United States Customs at the Port of Entry in the City of Newark, in the State of New Jersey, the said photographic-film positives, on payment of the duties prescribed by law.

The undersigned hereby states that his object in importing the said photographic-film positives is for the purpose of publicly exhibiting the same in the United States, under his personal management, control and supervision, and not for the purpose of traffic, sale or commerce.

Yours very truly,

L. LAWRENCE WEBER.

TOWNE & SPELLMAN,
Attorneys for L. Lawrence Weber, 115 *Broadway, N. Y. City.*

That the defendant herein acknowledged receipt of the said paper, and refused the request in writing as follows:

"Original received this 26th day of April, 1915, and request refused.

FREDERICK S. FREED,
Deputy Collector in Charge, Port of Newark, N. J."

Thirteenth. That your orator has been engaged in making arrangements to exhibit the said pictures in the United States, and has been put to great expense in doing so. That your orator has made arrangements to produce a great number of photographic-film positives for the purpose of said exhibition. That the value of the said pictures which the defendant refuses to allow complainant to import into the United States is decreasing daily; that at the end of thirty days from now the returns from said pictures will be at least twenty-five per cent. less than the returns would be at this time; that at the end of sixty days from now the returns from said pictures will be at least fifty per cent. less than the returns would be
8 at this time. Your orator says that at the present time there is a great demand on the part of the public of the United States to witness these pictures, which great public demand is due to the fact that the contest took place but twenty-two days ago and to the great enthusiasm of millions of people in the United States caused by the said Jess Willard having wrested the title of cham-

pion heavy-weight of the world from the said Jack Johnson, who held the said title for a number of years. Your orator further says that should he be unable to exhibit the said pictures in the United States until four months from this date, the said pictures would be valueless, as they would not attract sufficient of the public to warrant the large expenditures in manufacturing the aforesaid photographic-film positives and of the additional sums necessary to exhibit the same.

Fourteenth. That unless complainant is permitted to import the said photographic-film positives into the United States, he will sustain irreparable injury. Complainant reiterates the allegations contained in paragraph "Thirteenth" of this bill of complaint, and makes the same a part of this paragraph with the same force and effect as if the same were fully and at large set forth herein. Your orator further says that if a preliminary injunction is not granted, his rights will be absolutely destroyed before a final decree can be granted.

Fifteenth. Your orator says that he has no adequate remedy at law for the reasons:

First. That the defendant claims to be acting under the aforesaid statutes and therefore is protected in his refusal to permit complainant to import the said pictures into the United States. That the defendant's claim is correct.

Second. That the damages which would be sustained by the complainant are speculative and incapable of proof.

Third. That in the event the damages could be assessed, the defendant is not financially able to respond to the same, nor to any fair percentage thereof.

9 Sixteenth. Your orator shows that if the relief prayed for in this bill of complaint is granted it will avoid a multiplicity of suits, as will appear from the following:

First. Your orator would be subject to criminal prosecution each time he attempted to import the said films into the United States;

Second. Your orator would be subject to criminal prosecution each time he sent or carried the said pictures from one state to another;

Third. Your orator would be subject to criminal prosecution each time he deposited or caused to be deposited in the United States mails for mailing or delivery, or deposited or caused to be deposited with any express company or common carrier for carriage from one state or territory of the United States or the District of Columbia to any other state or territory, or the District of Columbia, the said films.

Seventeenth. Your orator further shows that his only remedy is in a court of equity, by way of injunctive relief, as it would be of great pecuniary loss to him to be compelled to defend the innumerable criminal prosecutions which would be brought against him in the event he attempted to import the said pictures into the United States at the various ports of entry, or attempted to transport them in any manner from one state to another; that he would be unable to obtain transportation of the said pictures from one state to another

on account of the criminal prosecutions which would be brought against any person or corporation who carried the same from one state to another. Your orator further shows that unless the injunctive relief prayed for is granted, it would be useless for the complainant to attempt to import the said pictures into the United States or to transport them in any way from one state to another, on account of the numerous penalties that might be imposed upon complainant before the statutes complained of were declared unconstitutional; that aside from the criminal prosecutions the property loss to the complainant would amount to hundreds of thousands of dollars as he would be unable to hire theatres to exhibit the pictures on account of the fear and apprehension of those owning the
10 said theatres that they might be subject to a prosecution for conspiracy in permitting the said pictures to be exhibited in said theatres. That your orator further says that there is no likelihood of his being able to import the said pictures into the United States, for the reason that every Collector and Deputy Collector at every port of entry in the United States is aware of the existence of the said statutes and will not allow the photographic-film positives to be brought into the United States.

Eighteenth. Your orator further shows that the injunctive relief prayed for is the only remedy which your orator has. Your orater cannot proceed by way of mandamus, nor would it be advisable for him to commit a technical violation of the law and proceed by way of a writ of habeas corpus, for the reason that by the time the matter could be finally adjudicated the pictures would be valueless, as by that time there will hardly be any enthusiasm in the public to see these pictures, and the amount of money realized from the exhibition of the same would not warrant the cost of the making of the films plus the other expenses necessary to exhibit the same.

Nineteenth. Your orator further shows that any delay in exhibiting the said pictures will result in irreparable injury for the reason that many spurious pictures have been and will be advertised and the public may be induced to believe that such spurious pictures represent the authentic moving pictures of the said Willard-Johnson contest. Your orator shows that an attempt is now being made to place before the public a picture representing the said Willard-Johnson contest, which was posed for by two parties who are not the aforesaid Willard and Johnson, or either of them. That in order to avoid the aforesaid statutes regarding the transportation of films of this character from one state to another, your orator is informed that the scheme of these parties is to have pictures for exhibition in the various states posed for in the respective states. Your orator further shows that another scheme employed is to show about twenty pictures of the contest under the advertisement that they are
11 the pictures of the contest, intending to convey the meaning that they are the moving pictures of the aforesaid contest.

Twentieth. Your orator respectfully says that if there is any doubt as to whether the relief prayed for should be granted, such doubt should be resolved in favor of your orator, for the reason that his

property rights will be destroyed long before a final decree can be entered herein.

To the end therefore that the defendant may, if he can, show why your orator should not have the relief hereby prayed, and may, according to the best of his knowledge and belief, full, true, direct and perfect answers make, but not upon oath, which is hereby waived, to the allegations herein contained, and in as much as your orator has no adequate remedy at law, he prays:

1st. That Writs of Injunction, not only by the final decree, but also by an interlocutory writ, issue out of and under the seal of this Honorable Court, to be directed to the said defendant:

(*a*). to restrain and enjoin the defendant, and all agents, servants and employees of the United States Government, connected with the United States Customs at the Port of entry in the City of Newark, State of New Jersey, from in any manner interfering with the complainant, his duly authorized agents and servants, or any of them, in entering through the United States Customs at the Port of entry in the City of Newark, in the State of New Jersey, for the purpose of importing the same into the United States, the photographic-film positives referred to in this bill of complaint, upon payment of the duties prescribed by law, and upon conforming with all the laws (other than the statutes referred to in this bill of complaint as unconstitutional) and regulations of the United States with respect to the entry and importation of goods into the United States and

(*b*) to restrain and enjoin the defendant, and all agents, servants and employees of the United States Government, connected
12 with the United States Customs at the Port of Entry in the City of Newark, State of New Jersey, from refusing to do any and all acts required of them by law to permit the complainant and his duly authorized agents and servants to enter at the Customs of the United States, at the port of entry in the City of Newark, in the State of New Jersey, for the purpose of importing the same into the United States, the photographic-film positive referred to in this bill of complaint, upon payment of the duties prescribed by law and upon conforming with all the Laws (other than the statutes referred to in this bill of complaint as unconstitutional) and regulations of the United States with respect to the entry and importation of goods into the United States.

2nd. That your orator may have such other and further relief in the premises, including final and interlocutory writs and decrees, and preliminary and temporary injunctions, as the nature of the case shall require and to Your Honors shall seem meet.

And may it please Your Honors to grant also unto your orator not only writs of injunction but also a writ of subpœna to be directed to the said Frederick S. Freed, Deputy Collector of the United States Customs in charge of the Port of Newark, New Jersey, commanding him to appear and make answer to the aforesaid bill of complaint at a certain time and to abide by the further order of the Court.

TOWNE & SPELLMAN,
Solicitors for Complainant.

13 SOUTHERN DISTRICT OF NEW YORK,
County of New York, ss:

L. Lawrence Weber, being duly sworn, deposes and says:
I am the complainant in the above-entitled action. I have read the foregoing bill of complaint and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true.

L. LAWRENCE WEBER.

Sworn to before me this 27th day of April, 1915.
[SEAL.] HARRY LYONS,
Commissioner of Deeds for the City of New York,
Residing in the County of New York.

N. Y. Co. Clerks No. 1002, N. Y. Co. Register No. 16084.
Bronx Co. Clerk No. 107. Bronx Co. Register No. 6040.
Kings Co. Clerk No. 128. Kings Co. Register No. 6091.

14 United States District Court for the District of New Jersey.

In Equity.

L. LAWRENCE WEBER, Complainant,
vs.
FREDERICK S. FREED, Deputy Collector of United States Customs in Charge of the Port of Newark, New Jersey, Defendant.

Motion.

The defendant, Frederick S. Freed, Deputy Collector of the United States Customs in charge of the Port of Newark, will move to dismiss the complainant's Bill of Complaint in the above entitled cause, in pursuance of Rule 29 of the Equity Rules of the United States Supreme Court for the following reasons:

1. Because Sections 1 and 3 of the Act of July 31, 1912, making "the transportation or importation of prize fight films, etc., unlawful," known as Sections 10,416 and 10,418 of the United States Compiled Statutes, being Sections 1 and 3 of Chapter 263 of the Laws of 1912, is constitutional.
2. Because this Court has not jurisdiction to grant the relief prayed in the said Bill of Complaint.
3. Because the said Bill of Complaint does not set forth facts sufficient to constitute a cause of action.

J. WARREN DAVIS,
United States Attorney for the District of New Jersey.

15 United States District Court for the District of New Jersey.

In Equity.

L. LAWRENCE WEBER, Complainant,
against
FREDERICK S. FREED, Deputy Collector of United States Customs in Charge of the Port of Newark, New Jersey, Defendant.

Final Decree.

Now on this seventh day of September, 1915, at an equity term of this Court, comes on for hearing and final determination the motion of the defendant herein to dismiss the complainant's Bill of Complaint in the above entitled cause, in pursuance of Rule 29 of the Equity Rules of the United States Supreme Court, the complainant appearing by his solicitors, Towne and Spellman (Charles A. Towne and Benjamin F. Spellman of counsel), and the defendant appearing by Hon. J. Warren Davis, United States District Attorney for New Jersey (Joseph L. Bodine, Esq., of counsel).

And the Court being fully advised in the premises, finds that the motion of the defendant herein to dismiss the complainant's Bill of Complaint in the above entitled cause, should be granted.

It is therefore ordered, adjudged and decreed by the Court that the motion of the defendant herein to dismiss the complainant's Bill of Complaint in the above entitled cause, in pursuance of Rule 29 of the Equity Rules of the United States Supreme Court, be and the same is hereby granted, to which order and ruling of the Court the complainant at the time excepted and excepts.

And thereupon the complainant elects to stand upon his
16 Bill of Complaint, whereupon—

It is ordered, adjudged and decreed by the Court that the complainant's Bill be, and the same is hereby dismissed at the costs of the complainant.

THOMAS G. HAIGHT, *Judge.*

We hereby consent to the entry of the foregoing final decree as to form.

September 2nd, 1915.

TOWNE & SPELLMAN,
Solicitors for Complainant.
J. WARREN DAVIS,
United States District Attorney for New Jersey.

17 United States District Court for the District of New Jersey.

In Equity.

L. LAWRENCE WEBER, Complainant,
against
FREDERICK S. FREED, Deputy Collector of United States Customs in Charge of the Port of Newark, New Jersey, Defendant.

Assignment of Errors.

And now comes the complainant, L. Lawrence Weber, by his solicitors and says that in the record of proceedings in the United States District Court for the district of New Jersey, in the above-entitled cause, and in the final decree made on the 7th day of September, 1915, therein, there is manifest error, and for such error the complainant assigns the following:

First. The District Court erred in granting the motion of the defendant herein to dismiss the complainant's Bill of Complaint in the above entitled cause, in pursuance of Rule 29 of the Equity Rules of the United States Supreme Court.

Second. That the District Court erred in dismissing the complainant's Bill of Complaint.

Third. That the District Court erred in holding to be constitutional Sections 1 and 3 of the Act of July 31, 1912, making "the transportation or importation of prize fight films, etc., unlawful," known as Sections 10,416 and 10,418 of the United States Compiled Statutes, being Sections 1 and 3 of Chapter 263 of the Laws of 1912.

Fourth. That the District Court erred in holding that this court has not jurisdiction to grant the relief prayed in the said

18 Bill of Complaint.

Fifth. That the District Court erred in holding that the said Bill of Complaint does not set forth facts sufficient to constitute a cause of action.

Sixth. That the District Court erred in holding that the importation into the United States by the complainant of the photographic-film positives described in the Bill of Complaint, owned by him, for the purpose of public exhibition by him, and under his management, control and supervision, and not for the purpose of traffic, sale, or commerce, is commerce.

Seventh. That the District Court erred in holding to be constitutional Section 10416 of the United States Compiled Statutes, being an act of Congress, which became a law on July 31, 1912, set forth in the Bill of Complaint, and in holding to be constitutional that part of section 10418 of the United States Compiled Statutes, being an act of Congress, which became a law on July 31, 1912, set forth in the Bill of Complaint, in so far as the same prescribes a penalty for a violation of the provisions of said section 10416.

Eighth. That the District Court erred in holding to be constitu-

tional, so far as the acts of the complainant are concerned in importing into the United States for the purpose of public exhibition by him, the photographic-film positives described in the Bill of Complaint under his management, control and supervision, and not for the purpose of traffic, sale or commerce, section 10416 of the United States Compiled Statutes, being an act of Congress, which became a law on July 31, 1912, set forth in the Bill of Complaint, and in holding to be constitutional in so far as the same affects the aforesaid acts of the complainant, section 10418 of the United States Compiled Statutes, being an act of Congress which became a law on July 31, 1912, set forth in the Bill of Complaint.

19 Ninth. That the District Court erred in refusing to grant the Writ of Injunction enjoining and restraining the defendant, as prayed for in the Bill of Complaint herein.

Wherefore complainant prays that the final decree of the United States District Court for the District of New Jersey, appealed from herein, be in all things reversed.

TOWNE & SPELLMAN,
Solicitors for Complainant.

20 United States District Court for the District of New Jersey.

In Equity.

L. LAWRENCE WEBER, Complainant,
against
FREDERICK S. FREED, Deputy Collector of United States Customs in Charge of the Port of Newark, New Jersey, Defendant.

Petition for and Order Allowing Appeal to the Supreme Court of the United States.

The above named complainant conceiving himself aggrieved by the final decree, order and judgment entered in the above entitled cause on the seventh day of September, 1915, does hereby appeal from the said final decree, order and judgment, to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

The appellant respectfully represents that the law gives him of right an appeal of this case to the Supreme Court of the United States from the final decree, order, and judgment of the United States District Court, for the district of New Jersey, aforesaid; that this is a case that involves the construction and application of the Constitution of the United States; and the constitutionality of a law of the United States is drawn in question.

L. LAWRENCE WEBER,
By TOWNE & SPELLMAN,
Solicitors for Complainant.

21 Upon consideration of the foregoing petition and of the assignment of errors presented herewith—it is now hereby ordered that an appeal to the Supreme Court of the United States, be, and the same is hereby allowed as prayed for in said petition.

Dated, September 7th, 1915.

THOMAS G. HAIGHT, *Judge.*

22 District Court of the United States of America for the District of New Jersey.

L. LAWRENCE WEBER, Complainant,

vs.

FREDERICK S. FREED, Deputy Collector of United States Customs in Charge of the Port of Newark, New Jersey, Defendant.

Know all men by these presents that L. Lawrence Weber, as Principal, and the New England Equitable Insurance Company, a corporation under the laws of the State of Massachusetts, with a place of business at #80 Maiden Lane, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Frederick S. Freed in the sum of five hundred and 00/100 ($500.00) dollars to be paid to the said Frederick S. Freed, for the payment of which well and truly to be made, said Principal and Surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed and dated the 7th day of September, 1915.

Whereas, the above named L. Lawrence Weber has prosecuted an appeal to the United States Supreme Court to reverse the final decree rendered in the above entitled suit, by a Judge of the District Court of the United States for the District of New Jersey.

Now, therefore, the condition of this obligation is such, that if the above named L. Lawrence Weber shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

L. LAWRENCE WEBER,
NEW ENGLAND EQUITABLE INSURANCE COMPANY,
By JAMES E. SWEENEY,
Resident Vice-President.

#36068.

Attest:

[SEAL.] W. J. MAY,
Resident Assistant Secretary.

The within bond approved as to form and sufficiency.

THOMAS G. HAIGHT, *Judge.*

23 STATE OF NEW YORK,
County of New York, ss:

On the 3rd day of September, 1915, before me personally appeared L. Lawrence Weber to me known and known to me to be the person described in and who executed the foregoing instrument, and he thereupon acknowledged to me that he executed the same.

[SEAL.] HARRY LYONS,
Commissioner of Deeds for the City of New York,
Residing in the County of New York.

N. Y. Co. Clerks No. 1002 N. Y. Co. Register No. 16084.
Bronx Co. Clerk No. 107, Bronx Co. Register No. 6040.
Kings Co. Clerk No. 128, Kings Co. Register No. 6091.

Justification—New York.

STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of September, 1915, before me personally appeared James E. Sweeney, Resident Vice-President of the New England Equitable Insurance Company, with whom I am personally acquainted, who being by me duly sworn, said: that he resides in the State of New York; that he is a Resident Vice-President of the New England Equitable Insurance Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he signed his name thereto as Resident Vice-President by like authority; and the said James E. Sweeney further says that he is acquainted with W. J. May and knows him to be a Resident Assistant Secretary of said Company; that the signature of the said W. J. May subscribed to said instrument, is in the genuine handwriting of said W. J. May and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said James E. Sweeney, and that the liabilities of the said Company do not exceed its assets, as ascertained in the manner provided in Chapter 33 of the Laws of 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York, and known as the Insurance Law.

[SEAL.] WILLIAM J. KIDD,
Notary Public, Kings County, No. 162.

Certificate filed in New York County Clerk's Office No. 203; Bronx County Clerk's Office No. 14; Queens County Clerk's Office No. 927; Westchester County Clerk's Office; New York Register's Office No. 7191.

My Commission expires March 30th, 1917.

At an adjourned special meeting of the Stockholders of the New England Equitable Insurance Company, duly called and held at the office of the Company, in the City of Boston, Massachusetts, on the 18th day of September, 1911, a quorum being present, the following By-Law was duly adopted:

Art. XVI, Section 1.

"All bonds, recognizances, or contracts of indemnity, policies of insurance and other writings obligatory in the nature thereof shall be signed by the President, First Vice-President, — Vice-President, Resident Vice-President or Attorney-in-fact, and except when signed by an Attorney-in-fact shall have the seal of the Company affixed thereto, duly attested by the Secretary, Assistant Secretary or Resident Assistant Secretary."

STATE OF NEW YORK,
County of New York, ss:

I, W. J. May, Resident Assistant Secretary of the New England Equitable Insurance Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of the said Company, and do hereby certify that the same is a correct and true transcript therefrom and of the whole of Article XVI, Section 1, of said original By-Law.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Company, at the City of New York, this 3rd day of September, 1915.

[SEAL.]

W. J. MAY,
Resident Assistant Secretary.

24 Corwin McDowell, President; B. J. Taussig, Chairman of Board; Allan Forbes, Secretary; W. ——st, Treasurer.

New England Equitable Insurance Company.

Incorporated under Massachusetts Laws 1901.

Paid Up Capital One Million Dollars.

Fidelity & Surety Bonds, Liability, Workmen's Compensation, Automobile, Property Damage, Accident, Health, Burglary and Plate Glass Insurance.

4 Liberty Square, Water & Kilby Streets, Boston, Mass.

Corner of Broadway & Locust St., St. Louis, Mo.

Financial Statement June 30, 1915.

Assets.

Bonds, Market Value	$1,285,071.88
Stocks, Market Value	977,419.00
Mortgages	42,800.00
Real Estate	10,972.79
Unpaid Premiums, Subsequent to March 31, 1915 (net)	424,917.07
Unpaid Premiums, Prior to March 31, 1915 (net)	195,670.22
Cash in Banks and Offices	152,990.17
Accrued Interest	15,372.58
Other Assets	150,885.63
Total Assets	$3,256,099.34

Liabilities.

Reserve for Unearned Premiums		$928,408.75
Reserve for Unpaid Losses		483,145.88
Reserve for Taxes		20,352.51
Other Liabilities		2,500.00
Capital	$1,000,000.00	
Surplus	821,692.20	
Surplus to Policy Holders		1,821,692.20
		$3,256,099.34

W. J. May being duly sworn, says that he is the Resident Assistant Secretary of the New England Equitable Insurance Company, and that the foregoing is a true and correct statement of the said Com-

pany's financial condition as of the 30th day of June, 1915, to the best of his information, knowledge and belief.

W. J. MAY. [SEAL.]

Sworn to before me this 3rd day of September, 1915.

[SEAL.] WILLIAM J. KIDD,
Notary Public, Kings County, No. 162.

Certificate filed in New York County Clerk's Office No. 203; Bronx County Clerk's Office No. 14; Queens County Clerk's Office No. 927; Westchester County Clerk's Office; New York Register's Office No. 7191.

My Commission expires March 30th, 1917.

25 UNITED STATES OF AMERICA:

To Frederick S. Freed, Deputy Collector of United States Customs in charge of the Port of Newark, New Jersey, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, D. C., within thirty days from and after — this citation bears date, pursuant to an appeal allowed by the United States District Court for the District of New Jersey wherein L. Lawrence Weber, is appellant, and you are the appellee, to show cause, if any there be, why the final decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Hon. Thomas G. Haight, one of the Judges of the United States District Court for the District of New Jersey, this 7th day of September, 1915.

THOMAS G. HAIGHT, *Judge.*

[Endorsed:] United States District Court for the District of New Jersey. In Equity. L. Lawrence Weber, Complainant, vs. Frederick S. Freed, Deputy Collector of United States Customs in charge of the Port of Newark, New Jersey, Defendant. (Original.) Citation. Towne & Spellman, Solicitors for Complainant, 115 Broadway, Borough of Manhattan, New York City.

26 United States District Court for the District of New Jersey.

In Equity.

L. LAWRENCE WEBER, Complainant,
against
FREDERICK S. FREED, Deputy Collector of United States Customs in Charge of the Port of Newark, New Jersey, Defendant.

Affidavit of Service.

STATE OF NEW JERSEY,
City of Trenton, ss:

Harry Lyons, being duly sworn, says: That he is over the age of twenty-one years and a resident of the City and State of New York; that on the 7th day of September, 1915, at the Post Office Building, City of Trenton, State of New Jersey, he served the citation to the United States Supreme Court, Final decree, petition and order allowing appeal to the United States Supreme Court, Assignment of errors and bond, all in the above matter on J. Warren Davis, United States Attorney for the District of New Jersey, by delivering to and leaving with the said J. Warren Davis, personally, a true copy of each of the aforementioned papers.

HARRY LYONS.

Subscribed and sworn to before me this 7th day of September, 1915.

ROBERT S. CHEVRIER,
Deputy Clerk.

27 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
District of New Jersey, ss:

I, George T. Cranmer, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the foregoing is a full, true and complete transcript of the Record on Appeal in the case of L. Lawrence Weber, Appellant, against Frederick S. Freed, Deputy Collector, &c., Appellee.

In Testimony Whereof I have hereunto subscribed my name and affixed the seal of said Court, this 10th day of September, 1915.

[Seal District Court of the United States, District of New Jersey.]

GEORGE T. CRANMER, *Clerk,*
By CHARLES S. CHEVRIER, *Deputy.*

Endorsed on cover: File No. 24,927. New Jersey D. C. U. S. Term No. 644. L. Lawrence Weber, appellant, vs. Frederick S. Freed, Deputy Collector of United States Customs in charge of the Port of Newark, N. J. Filed September 28, 1915. File No. 24,927.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

L. LAWRENCE WEBER,
Appellant,

AGAINST

FREDERICK S. FREED, Deputy Collector of United States Customs in charge of the Port of Newark, New Jersey,
Respondent.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY.

MOTION BY THE APPELLANT TO ADVANCE.

Come now Charles A. Towne and Benjamin F. Spellman, on behalf of the appellant, and move the Court to advance this cause for hearing on a day convenient to the Court during the present term.

The case involves the power of the Collectors of Customs, under sections 10,416 to 10,418 of the Compiled Statutes of the United States, passed July 31, 1912, to refuse entry into the United States of any film or other pictorial representation of any prize fight, or

encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition. It also involves the right to enter such films under paragraph 380 of the Tariff Act of October 31, 1913.

Appellant demanded the right to enter through the United States Customs at the Port of Entry in the City of Newark, State of New Jersey, certain photographic-film positives of an encounter of pugilists, on payment of the duties prescribed by the aforesaid paragraph 380 of the Tariff Act of October 31, 1913, which request was refused by the respondent herein. Appellant thereupon brought a suit in equity in the United States District Court for the District of New Jersey, for an injunction, the effect of granting which would be to permit the entry of the said films into the United States upon payment of the duties prescribed by law. The questions involved had never been tested and the United States was anxious for a speedy decision, to avoid a multiplicity of suits and for the reason that it involved a revenue case in which the United States are concerned and a matter of general public interest, and the constitutionality of sections 10,416 to 10,418 of the Compiled Statutes, so far as the same affected the particular acts of the appellant, as also property rights of the appellant amounting to at least one million dollars which would be destroyed unless there was immediate relief to appellant if he was entitled thereto. The motion for an injunction was argued on a few days' notice, and in denying the same, the District Judge

stated in his opinion: "An immediate appeal from my refusal to grant the preliminary injunction can be taken to the Circuit Court of Appeals (Judicial Code of 1912, Section 129). I am assured by the District Attorney that he will facilitate an appeal and I have no doubt that the matter can be heard by the Circuit Court of Appeals within a very few days." The appeal in the Circuit Court, on the consent of the United States, was heard four days later, but the appeal was not decided until more than two months thereafter.

This matter was then brought on for final hearing and final determination in the District Court on the motion of the respondent to dismiss the complainant's bill of complaint herein, in pursuance of Rule 29 of the Equity Rules of the United States Supreme Court, as an appeal could not be taken from the decree of the Circuit Court affirming the interlocutory decree. A final decree was thereafter entered granting respondent's said motion, and the appeal therefrom is now before this court.

The District Court dismissed the bill of complaint herein upon the grounds, among others, that it had not jurisdiction to grant the relief prayed for in the bill of complaint and that the said bill of complaint did not set forth facts sufficient to constitute a cause of action.

In view of the aforesaid considerations, and of the fact that the property rights of the appellant will be destroyed long before this appeal can be heard by awaiting its turn in the regular call, and of the further fact that a decision on this appeal will avoid a multi-

plicity of suits—other cases involving the same statutes having gone to final decree in the United States District Court for Maine and New York since this litigation was commenced—this appeal should be decided as promptly as possible.

The United States concur in this motion.

CHARLES A. TOWNE,
BENJAMIN F. SPELLMAN
Counsel for Appellant.

October, 1915.

SUBJECT INDEX.

	PAGE
Statement	1
Assignment of Errors	6
Argument	8

POINT I.

The Act (July 31, 1912, c. 263, §§ 1, 2, and 3, being Sections 10416, 10417 and 10418, of the Compiled Statutes of the United States) is unconstitutional and void because in violation of the Ninth and Tenth Amendments to the Constitution of the United States 8

POINT II.

Section 10416 is unconstitutional and void and beyond the power of Congress to enact under Paragraph 3 of Section 8 of Article I of the Constitution, commonly called the Commerce Clause, as applied to the exclusion from entry into the United States of photographic-film positives by the owner designed to be used for purposes of public exhibition in the United States under his personal management, control and supervision, and not for the purpose of traffic, sale or commerce..... 19

(1) Photographic-film positives, imported by the owner, designed to be used for purposes of pub-

PAGE

lic exhibition by him and not for purposes of traffic, sale or commerce, are not Articles of Commerce 19

Definitions of Commerce... 19

The Cases..... 21

(2) The public exhibition of motion pictures is not commerce; and hence the photographic-film positives referred to in this case, being "designed to be used" for purposes of such exhibitions, are not Instrumentalities of Commerce..... 57

INDEX OF CASES CITED.

Adair *v.* United States, 208 U. S. 161..... 20, 28

Almy *v.* California, 24 How. 169..... 24

Athanasaw *et al. v.* United States, 227 U. S. 326 .....43, 46, 47

Bacon *v.* Walker, 204 U. S. 311..... 9

Boland *v.* United States, 236 U. S. 216.... 27, 28

Bowman *v.* Chicago, etc., Ry., 125 U. S. 465. 32

Brown *v.* Maryland, 12 Wheat. 419..... 23

Buttfield *v.* Stranahan, 192 U. S. 470..... 27, 28

County of Mobile *v.* Kimball, 102 U. S. 691. 21

Crutcher *v.* Kentucky, 141 U. S. 47.....9, 26, 32

Diamond Glue Co. *v.* United States, 187 U. S. 611..... 56

Diamond Match Co. *v.* Roeber, 106 N. Y. 473 56

PAGE

Engel *v.* O'Malley, 219 U. S. 128..... 56

Gibbons *v.* Ogden, 9 Wheat. 1..10, 20, 23, 25, 40, 41
Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196..... 39

Hipolite Egg Co. *v.* United States, 220 U. S. 45 ..... 30, 37
Hoke *et al. v.* United States, 227 U. S. 308, 38, 43, 45, 46, 47
Hooper *v.* California, 155 U. S. 648..... 26, 32
Hopkins *v.* United States, 171 U. S. 578.... 56

International Textbook Co. *v.* Pigg, 217 U. S. 91..... 29

Keller *v.* United States, 213 U. S. 139..... 10
Kidd *v.* Pearson, 128 U. S. 1..... 21

License Cases, 5 How. 504..... 32
Lottery Cases, 188 U. S. 321, 21, 27, 30, 31, 33, 34, 35, 36, 41

Metropolitan Opera Co. *v.* Hammerstein, 162 App. Div. N. Y. 691.....56, 58, 59

Nathan *v.* Louisiana, 8 How. 73..... 25, 26
New York Life Ins. Co. *v.* Cravens, 178 U. S. 389 .....26, 27, 32

Passenger Cases, 7 How. 283..... 10, 23
Paul *v.* Virginia, 8 Wall. 168..... 24, 32
Pensacola Tel. Co. *v.* West, etc., Tel. Co., 96 U. S. 1..... 24, 41
People *v.* Klaw & Erlanger, 55 Misc. N. Y. 72 57

PAGE

Pickard *v.* Pullman, 117 U. S. 34..... 26
Pittsburg, etc., Coal Co. *v.* Bates, 156 U. S. 577 32

R. R. Co. *v.* Husen, 95 U. S. 465..... 20

Second Employers' Liability Cases, 223 U. S. 1..... 21

Thorpe *v.* R. Co., 27 Vt. 149..... 9

United States *v.* Addyston Pipe & Steel Co., 85 Fed. Rep. 271..... 56
United States *v.* Addyston Pipe & Steel Co., 175 U. S. 211..... 56
United States *v.* Holliday, 3 Wall. 407..... 24
United States *v.* Popper, 98 Fed. Rep. 423.. 47, 48
United States Fidelity Co. *v.* Kentucky, 231 U. S. 394..... 29

Weber *v.* Freed, 224 Fed. Rep. 355, 16, 17, 49, 51, 52
W. U. Tel. Co. *v.* Kansas, 216 U. S. 1..... 31
Williams *v.* Fears, 179 U. S. 270..... 56

Supreme Court of the United States,

OCTOBER TERM, 1915.

L. LAWRENCE WEBER,
Complainant and Appellant,

vs.

FREDERICK S. FREED, Deputy Collector of United States Customs in charge of the Port of Newark, New Jersey,
Defendant and Appellee.

No. 644.

BRIEF FOR COMPLAINANT AND APPELLANT.

This is an appeal from a final decree of Honorable Thomas G. Haight, Judge of the United States District Court for the District of New Jersey, duly entered in the office of the Clerk, on the seventh day of September, 1915, dismissing the Bill of Complaint.

STATEMENT.

ALL MATTERS ALLEGED BY THE COMPLAINANT ARE ADMITTED.

The appeal is before the Court for decision on the matters alleged in the bill of complaint (Record,

pp. 1-7). *None of the matters alleged in the bill of complaint has been denied or challenged.*

The complainant is a citizen and resident of the State of New York, now, and for many years last past, owner, lessee and manager of a number of theatres and places of amusement in the United States, and now, and for many years last past, engaged in making theatrical productions and managing theatrical performers and artists.

The defendant is Deputy Collector of the United States Customs in charge of the Port of Entry at Newark, New Jersey.

On the 26th day of April, 1915, the complainant served upon the defendant the following demand in writing:

"CITY OF NEWARK,
State of New Jersey,
April 26th, 1915.

HON. FREDERICK S. FREED,
Deputy Collector of U. S. Customs,
in charge of Port of Newark, N. J.

SIR:

The undersigned, the owner of certain photographic-film positives for use in connection with moving picture exhibits, and designed to be used for the purpose of public exhibition, of a certain encounter of pugilists namely: Jess Willard and Jack Johnson, held at the City of Havana, in the Republic of Cuba, on the 5th day of April, 1915, hereby demands the right to enter through the United States Customs at the Port of Entry in the City of Newark, in the State of New Jersey, the said photographic-film positives, on payment of the duties prescribed by law.

The undersigned hereby states that his

object in importing the said photographic-film positives is for the purpose of publicly exhibiting the same in the United States, under his personal management, control and supervision, and not for the purpose of traffic, sale or commerce.

Yours very truly,
L. LAWRENCE WEBER.

TOWNE AND SPELLMAN,
Attorneys for L. Lawrence Weber,
115 Broadway, N. Y. City."

Upon the said paper the defendant wrote the following:

"Original received this 26th day of April, 1915, and request refused.
FREDERICK S. FREED,
Deputy Collector in charge,
Port of Newark, New Jersey."

The proceeding was an application by the complainant for an injunction the effect of granting which would be to permit the entry of the said films into the United States upon payment of the duty provided by law.

That duty is specified in paragraph 380 of the Tariff Act now in force, viz, Act of October 3, 1913, as follows:

"Photographic-film positives, imported in any form, for use in any way in connection with moving-picture exhibits, including herein all moving, mofion, motophotography or cinematography film pictures, prints, positives or duplicates of every kind and nature and of whatever substance made, one cent per linear or running foot: *Provided, however,* That all photographic films imported under this sec-

> tion shall be subjected to such censorship as may be imposed by the Secretary of the Treasury."

The Secretary of the Treasury has never prescribed rules and regulations to give effect to the *proviso* of said paragraph.

The action of the Collector in refusing the admission of these films is based on section 10416 of the United States Compiled Statutes, passed July 31, 1912, which is as follows:

> "It shall be unlawful for any person to deposit or cause to be deposited in the United States mails for mailing or delivery, or to deposit or cause to be deposited with any express company or other common carrier for carriage, or to send or carry from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia or to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition."

By section 10418 the violation of section 10416 is punishable by a fine of not more than One Thousand Dollars and imprisonment for not more than one year, or both.

The above recitals are from the Bill of Complaint (Record, pp. 1-7).

This criminal Statute was passed pursuant to the power granted to Congress in paragraph 18 of Section 8 of Article 1 of the Constitution, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers";

the said "foregoing powers" being the various grants of legislative authority to Congress. Among the powers thus enumerated is that granted by paragraph 3 of the said section 8:

> *"To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes,"*

commonly known as the Commerce Clause; and it was in aid of this clause that said section 10416 was passed.

On the 6th day of May, 1915, an interlocutory order was entered denying complainant's motion for an injunction, and on the same day a petition on appeal to the Circuit Court of Appeals for the Third Circuit was filed, with bond.

On May 17th, 1915, the United States Attorney for the District of New Jersey filed a motion to dismiss the Bill of Complaint.

On August 21st, 1915, there was filed in the District Court a mandate of the United States Circuit Court of Appeals confirming the interlocutory decree of the District Court.

On September 7th, 1915, the final decree of the District Court dismissing the bill of complaint was entered, and on the same day an appeal was duly taken and perfected to this Court.

Two questions are presented.

(1) Whether the act of July 31, 1912, c. 263, §§ 1, 2, and 3, being Sections 10416, 10417 and 10418, of the Compiled Statutes of the United States, is constitutional; and

(2) Whether Section 10416 is constitutional and within the power of Congress to enact under paragraph 3 of Section 8 of Article 1 of the Constitution, commonly called the Commerce Clause, as applied

to the exclusion from entry into the United States of photographic-film positives by the owner, designed to be used for purposes of public exhibition in the United States under his personal management, control and supervision, and not for the purpose of traffic, sale or commerce.

ASSIGNMENT OF ERRORS.

FIRST: The District Court erred in granting the motion of the defendant to dismiss the Bill of Complaint in pursuance of Rule 29 of the Equity Rules of the United States Supreme Court.

SECOND: The District Court erred in dismissing the Bill of Complaint.

THIRD: The District Court erred in holding to be constitutional §§ 1 and 3 of the Act of July 31, 1912, known as Sections 10416 and 10418 of the United States Compiled Statutes, being Sections 1 and 3 of chapter 263 of the Laws of 1912.

FOURTH: The District Court erred in holding that it had no jurisdiction to grant the relief prayed for in the Bill of Complaint.

FIFTH: The District Court erred in holding that the Bill of Complaint does not set forth facts sufficient to constitute a cause of action.

SIXTH: The District Court erred in holding that the importation into the United States by the complainant of the photographic-film positives described in the Bill of Complaint, owned by him, for the purpose of public exhibition by him, and

under his management, control and supervision, and not for the purpose of traffic, sale or commerce, is commerce.

SEVENTH: The District Court erred in holding to be constitutional Section 10416 of the United States Compiled Statutes, and in holding to be constitutional that part of Section 10418 set forth in the Bill of Complaint (Record, pp. 2 and 3), in so far as the same prescribes a penalty for the violations of the provisions of said Section 10416.

EIGHTH: The District Court erred in holding to be constitutional said Section 10416 of the United States Compiled Statutes and said Section 10418 so far as the same prescribes a penalty for a violation of Section 10416, as applied to the importation by the complainant into the United States for the purpose of public exhibition under his own management, control and supervision, and not for the purpose of traffic, sale or commerce, of the photographic-film positives described in the Bill of Complaint.

NINTH: The District Court erred in refusing to grant the writ of injunction prayed for in the Bill of Complaint (Record, pp. 10 and 11).

ARGUMENT.

POINT I.

THE ACT (July 31, 1912, c. 263, §§ 1, 2 and 3, being Sections 10416, 10417 and 10418, of the Compiled Statutes of the United States) IS UNCONSTITUTIONAL AND VOID BECAUSE IN VIOLATION OF THE NINTH AND TENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Article IX is as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Article X is as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

It is, of course, a commonplace that the Government of the United States is one of delegated powers, limited to specified objects, and that it possesses none except such as are enumerated in the Constitution and such others as are necessary and proper to the exercise of the powers granted. "The Government of the United States," says Justice Story, "can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

The general power of legislation, inherent in self-governing communities, which comprehends the regulation of the health, the good order, and the convenience of the community, is commonly called the police power. It has been defined to be "the power vested in the legislature to make such laws

as they shall judge to be for the good of the commonwealth and its subjects" (*Bacon* v. *Walker*, 204 U. S. 311); as "the power to govern men and things, extending to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State" (*Thorpe* v. *R. Co.*, 27 Vt. 149). Judge Cooley has said of it (Constitutional Limitations, Seventh Edition, 829): It "embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with the like enjoyment of rights by others."

In *Crutcher* v. *Kentucky* (141 U. S. at p. 61), the Court says:

> "But whilst it is only such things as are clearly injurious to the lives and health of the people that are placed beyond the protection of the commercial power of Congress, yet when that power, or some other exclusive power of the Federal Government, is not in question, the police power of the State extends to almost everything within its borders; to the suppression of nuisance, to the prohibition of manufactures deemed injurious to the public health; to the prohibition of intoxicating drinks, their manufacture or sale; to the prohibition of lotteries, gambling, horse-racing or anything else that the legislature may deem opposed to the public welfare" (citing numerous cases).

The police power was never delegated to the General Government. Said Chief Justice Taney in the

Passenger Cases (7 How. at p. 470): "It is a power of self-preservation and was never intended to be surrendered."

Says Judge Cooley: "In the American constitutional system, the power to establish the ordinary regulations of police power has been left with the individual States, and cannot be assumed by the National Government" (Constitutional Limitations, 574). In *Keller* v. *United States,* 213 U. S. at page 144, the Court declares that "the existence of such a power in the States has been uniformly recognized in this Court" (citing several cases). "It is embraced in what Mr. Chief Justice Marshall in *Gibbons* v. *Ogden* calls that 'immense mass of legislation' which can be most advantageously exercised by States, and over which the national authorities cannot assume supervision or control."

That the regulation of public exhibitions, amusements and entertainment, whether by living actors or by pictures, moving or otherwise, is peculiarly within the competency of the police power, will not, we suppose, be anywhere denied. It is, indeed, difficult to imagine a case of its exercise more typical and appropriate than this. Nobody would for a moment contend that Congress could pass a law regulating or prohibiting the exhibition of motion pictures in a single State in the Union. It could directly legislate on the subject only for the District of Columbia and in Federal territory where it itself possesses general legislative power.

Yet the suppression of such pictures is the precise object of this statute, and its only object. It makes no pretense of being anything but a police regulation. Other statutes have been objected to, and have been the subject of examination in this Court, on the ground that they were unwarrantable

attempts by Congress to exercise the police power reserved to the States; but in every instance preceding this one Congress has at least attempted to bring its action within the scope of specific national constitutional power. For example, whatever may be said of the effect of the statute against the interstate transportation of lottery tickets and of the recent Mann Act, Congress at least claimed to be acting under the authority of the Commerce Clause (par. 3, section 8, Article I of the Constitution) in passing them. It is true that in the discussion in Congress attending the passage of the Anti-Lottery statute it clearly enough appeared that the object in view was to suppress lotteries, and that the title of the Act (March 2, 1895, c. 191) itself employs the expression, "for the suppression of lottery traffic"; yet the complete title of the Act was, "An Act for the Suppression of Lottery Traffic through *National Interstate Commerce* and the Postal Service *Subject to the Jurisdiction and Laws of the United States;* and the first section contains the following language:

> "That any person who shall cause to be brought within the United States from abroad, *for the purpose of disposing of the same* * * * any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery," etc.

Congress, in other words, then recognized the necessity of connecting the condemned transaction with some of the established indicia of Commerce, with buying and selling, trade, traffic or commercial intercourse.

It is a striking and significant fact that Congress in enacting the statute now under examination, for

the first time attempted the exercise of the police power reserved to the States without any recital or declaration linking the exercise of the power with the grant made in the Commerce Clause. Indeed, far from employing language connecting the importation or carriage of the films with acts of a commercial nature, the statute specifically renounces all association with commerce as a necessary ingredient in the offence, declaring, in Section 10416, that the prohibited films are those *"designed* to be used * * * for purposes of *public exhibition,"* and, in Section 10417, making an "intent to * * * exhibit" co-ordinate with the "intent to sell, distribute (or) circulate."

The purpose is made even more clearly apparent in the Congressional debates during the consideration of the bill.

In the course of the debate in the Senate while the proposed act was pending one Senator declared:

> "I am not sure that it ought not to be somewhat enlarged. There are other things besides the exhibition of prize-fights that are demoralizing in these picture shows" (Senator Gallinger, of N. H., Cong. Rec., 62 Cong., 2d Session, p. 8354).

Another Senator stated:

> "This is a special matter that has attracted the attention of the public, and there are some impending performances that it is intended, if possible, to reach" (Senator Bacon of Ga., *Ib.*).

Still another stated:

> "It is immoral." (Referring to a picture of a prize-fight.) (Senator Heyburn of Idaho, *Ib.*, p. 8769.)

Another statement of a Senator already quoted (Bacon) was this:

> "I do hope that no slight consideration will induce the Senator to object, because the matter is really most deeply at heart with a very large part of the religious and moral and respectable element of the whole country, and they desire the passage of the bill" (*Ib.*).

In the House of Representatives a champion of the bill declared:

> "It is to prevent the transportation in interstate commerce of films and pictorial representations of prize-fights—the type of fights which have been outlawed by nearly all the States of the Union, as lotteries had been outlawed by the several States before like Federal legislation was enacted touching the transportation through interstate commerce of tickets, lottery advertisements and the like, and other gambling schemes" (Record, p. 9873).

Another speaker stated:

> "The object of it is to prevent demoralizing pictures from being exhibited all over the country" (*Ib.*, 9874).

Nothing could be plainer than the intent of this statute. Its purpose was to accomplish indirectly what Congress could not accomplish directly, viz., to prevent the public exhibition of moving-pictures of prize-fights or other pugilistic encounters. It certainly is not within the power of Congress to do this. Had it been so, Congress would have passed a simple statute directly forbidding such exhibitions; but this is so clearly an exercise of police power, competent only to the states, that it never entered anybody's head to go about it in that

fashion. The device adopted sought to accomplish the desired end through the exercise of an alleged commerce power of Congress, and no pretence whatever was made to disguise the fact that it was a device. The situation was thus stated by a member of the House during the debate:

> "We do not need to occupy the time of the National Congress to regulate such matters, and I doubt very much whether there is any state in this Union that needs to have the time of this Congress taken up in the regulation of its internal affairs. I wonder what it is that causes men from the Southland, who in this Hall have always insisted upon the doctrine of State rights, to arise and urge with such great seriousness that legislation of this kind be passed? I do not believe it is necessary for the Natoinal Government to invade the States of the Union and tell them what they shall and shall not do in this situation; and I suggest to Members that we might in these days be giving our attention to problems of much more concern to the American people than this one, rather than to allow men here to demagogue along certain lines" (Record, p. 9875).

It seems clear to us that in no case could there be more properly invoked the canon of construction that the Court shall inquire into the purpose and effect of the statute and not be bound by the mere recitals in the act itself.

If the device adopted by Congress in this instance shall receive the support of the courts, there is absolutely no limit, short of the complete absorption of the police power, to the encroachment which Congress, through the employment of other similar means, may make upon the reserved powers of the States. We doubt whether it is possible for any

branch of local legislation to survive in the event of a persistent effort by Congress to stifle it inferentially if the present attempt in that direction should be judicially approved. Suppose, for example, that Congress should attempt to regulate the size of theatres, the number of exits they should provide, the methods of ventilation employed, etc., by passing a law denying to the channels of foreign and interstate commerce all timber, stone, iron and steel, cement and other materials brought into this country or taken across State lines, if the same be "designed to be used" in the construction of any sort of theatre except as described in the act; could it not be argued there as plausibly as it is argued here that the *motive* of Congress is of no consequence; that it has full power over foreign and interstate commerce; that transportation is commerce; that it may select the subjects of commerce which it makes subject to this regulation; and that the result and effect upon the police regulation of theatres is a mere incident of the exercise of its power over commerce? Suppose, again, that the majority of Congress, from either prejudice or conviction against homœopathy or Christian Science, should pass a law closing the facilities of interstate common carriers to medical books advocating the theories of Hahnemann and to Mrs. Eddy's annotated edition of the Bible; would the courts sustain these enactments under the Commerce Clause? In the last supposed case, of course, it would be objected that the act was in conflict with the First Amendment to the Constitution, which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." But, is the inability of Congress to pass an act conflicting with a specific provision

of the Constitution denying it a certain power any greater than its inability to exercise power "not delegated" but "reserved to the States respectively, or to the people"? In each case there is an utter lack of power; and in each it is the Constitution of the United States which is the source of that lack of power. In the one case the power is denied to Congress, and in the other case it is not granted to Congress. In neither case does Congress possess it.

We say, therefore, that if Congress may regulate picture shows in the manner attempted in this statute it may regulate the practice of medicine and the observance of religion by similar indirection.

In the opinion in the Circuit Court of Appeals in this case, McPherson, *J.* (*Weber* v. *Freed,* 224 Fed. Rep., at p. 357), it is said:

"In our opinion the statute under review belongs undoubtedly to a class of which numerous examples exist, namely, statutes that fall directly under the Commerce Clause, but affect indirectly the field of the police power."

With all deference we venture to challenge the application of this language to the statute in question. Only by the most strained construction can it be said to contemplate any regulation of commerce whatever; it is not a provision incidental to legislation covering any general scheme of importation or transportation. It relates to a single subject matter or classification and baldly prohibits its importation altogether; and it shows, on its face, not indirectly and by inference, but plainly and almost defiantly, if we may be permitted so emphatic a word, that the Congressional purpose was not at all to enact a regulation of commerce that might, in the language of the learned Circuit

Court, "affect indirectly the field of the police power", but that the object, and the only object, of the statute was to prevent the exhibition of moving-pictures of pugilistic encounters. In view of this purpose, the only one avowed in support of the legislation at the time of its enactment, and so unmistakably announced in the law itself, we respectfully ask how it is possible to say that the statute could only "indirectly" affect the police power of the States?

Further, the opinion (*Ib.*) referring to the power of exclusion, says: "Manifestly, the power must exist somewhere, and as the States do not possess it there is no other depository but the Federal Government."

This proposition, we venture to suggest, involves a rather dangerous rule of constitutional construction. It is difficult to imagine any limitation whatever to the legislative power of Congress if the rule thus stated be a sound rule of constitutional law. If the language just cited had been employed in comment upon some act of Congress having the nature of an embargo, or upon some incidental prohibitory clause in a tariff act, it might not seem to be quite so extreme; but, based on a clear and avowed exercise of police power by Congress, it certainly appears to us to be of most questionable application.

Moreover, the States are not helpless against the importation of articles which they may deem objectionable on the ground of public health or morals. The Tenth Amendment to the Constitution, by providing that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people", makes it perfectly clear

that this power of self-protection exists unimpaired in the States.

The opinion of the Circuit Court continues: "If, for example, a State should not be unwilling, or should perhaps even be desirous, to allow moving pictures of a prize fight to be exhibited, such a policy would of course be hampered by the act in question; but the interference would be indirect, merely an unavoidable consequence of the exercise by Congress of its sovereign and undoubted power to regulate, and therefore to prohibit, commerce with foreign countries."

The supposed case of the willingness of a State to permit the importation of such pictures is exemplified in practically every State in the Union. The "interference" suggested, however, we venture to point out, is not here due to an incidental clash between a congressional statute of commercial regulation and State laws; it is rather a plain case of attempted legislation by Congress on a subject absolutely within the competency of the States, and as to which a variety of treatment in different parts of the country reflects, as such legislation should, local sentiment.

We respectfully submit that the statute here in question is unconstitutional and void as repugnant to the Ninth and Tenth Amendments of the Constitution of the United States.

POINT II.

SECTION 10416 IS UNCONSTITUTIONAL AND VOID AND BEYOND THE POWER OF CONGRESS TO ENACT UNDER PARAGRAPH 3 OF SECTION 8 OF ARTICLE I OF THE CONSTITUTION, COMMONLY CALLED THE COMMERCE CLAUSE, AS APPLIED TO THE EXCLUSION FROM ENTRY INTO THE UNITED STATES OF PHOTOGRAPHIC-FILM POSITIVES BY THE OWNER DESIGNED TO BE USED FOR PURPOSES OF PUBLIC EXHIBITION IN THE UNITED STATES UNDER HIS PERSONAL MANAGEMENT, CONTROL AND SUPERVISION, AND NOT FOR THE PURPOSE OF TRAFFIC, SALE OR COMMERCE.

(1) *Photographic-film positives, imported by the owner, designed to be used for purposes of public exhibition by him and not for purposes of traffic, sale or commerce, are not Articles of Commerce.*

Definitions of Commerce:

Considerations of space make it impracticable to give here anything like an exhaustive citation of the definitions that have been given by lexicographers and courts of the word "commerce." The following, however, include practically all the connotations of the word in authoritative usage:

Century Dictionary:

> "Interchange of goods, merchandise or property of any kind; trade; traffic; used more especially of trade on a large scale."

Standard Dictionary:

> "Exchange of goods, productions, or property of any kind; especially exchange on a large scale, as between states or nations; ex-

tended trade; in economics, often grouped with agriculture and manufactures as a branch of production."

Webster's Dictionary:

"Exchange of merchandise on a large scale between different places or communities; extended trade or traffic."

Chief Justice Marshall, in *Gibbons* v. *Ogden* (9 Wheat. 1, 189-190):

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." (This definition has been quoted scores of times in the opinions of the courts, the word "intercourse" being, however, usually explained as meaning "commercial intercourse", which, indeed, Marshall's own language clearly indicates to be his meaning.)

Justice Harlan, in *Adair* v. *United States* (208 U. S. 161, 177):

"Commerce among the several states comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several states, but not to that commerce 'completely internal', which is carried on between man and man, in a state, or between different parts of the same state, and which does not extend to or affect other states."

Justice Strong, in *R. R. Co.* v. *Husen* (95 U. S. 465, 470):

"Transportation is essential to commerce, or rather it is commerce itself."

Justice Harlan, in the Lottery Cases (188 U. S. 321, 352-353):

> "The cases * * * show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph."

Justice Field, in *County of Mobile* v. *Kimball* (102 U. S. 691, 702):

> "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

Justice Lamar, in *Kidd* v. *Pearson* (128 U. S. 1, 20):

> "The buying and selling and the transportation incidental thereto constitute commerce."

Justice VanDeVanter, in Second Employers' Liability Cases (223 U. S. 1, 46):

> "The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches including transportation of passengers and property by common carriers, whether carried on by water or by land."

The cases.

No provision of the Federal Constitution has approached the Commerce Clause in the quantity of litigation it has stimulated. The number, complexity and importance of the cases that it has brought into the courts have been themes of frequent comment. Down to 1840 the construction of

the Commerce Clause had been involved in only 5 cases in the Supreme Court and 58 in the State and Federal Circuit and District Courts; by 1860 the numbers were respectively, 20 and 164; by 1870, 30 and 238; by 1880, 77 and 494; by 1890, 148 and 800; by 1898, the last date for which we have found figures given, 213 and approximately 1,400. There can be no doubt that the increase since 1898 has been in a correspondingly augmenting ratio.

The causes of this growth of the commerce litigation have been two; first, the marvelous development of the country in population, in agriculture, in manufacture and in transportation, which has vastly multiplied the subjects and instrumentalities of commerce and the rapidity and diversity of their distribution throughout the Union; and secondly, the gradual extension, under the joint influence of legislation and interpretation, of the application of the language of the Commerce Clause. There can be no doubt that one of the results has been a tendency to centralize at Washington more and more of the legislative activities heretofore regarded as peculiarly within the province of local legislatures and to throw increasing burdens upon the Federal Courts. So rapidly has this tendency found expression that many statesmen and jurists have shown grave concern lest the country should lose that vivid and healthful interest in the government which accompanies home rule and the responsibility of local governmental instrumentalities. It is easy to be seen that, if carried too far, this process might ultimately result in an unwieldy, centralized and unmanageable bureaucracy at the seat of the national government.

For this reason there has been a disposition upon the part of many to believe that the extension of

the Federal jurisdiction under the Commerce Clause has already gone as far as consists with wise public policy, and that the courts ought to scrutinize with increasing care and caution the provisions of legislation whose purpose is, under the guise of exercising power over interstate and foreign commerce, to usurp the police power of the states. We believe that the present case illustrates in a remarkable manner both the legislative disposition, already noted, and the opportune duty of the judiciary.

In *Gibbons* v. *Ogden* (9 Wheat. 1), the leading case, so constantly cited, under the Commerce Clause, and from Judge Marshall's great opinion in which we have taken the definition of "commerce" hereinbefore cited, the point decided was that "commerce" includes navigation, the Court holding it to be beyond the power of the State of New York to control by license interstate waters.

In *Brown* v. *Maryland* (12 Wheat. 419, 446), the opinion in *Gibbons* v. *Ogden* was approved, and an act of the Legislature of Maryland requiring importers to take out a license to sell imported goods was held to be repugnant to the Constitution as an attempt to exercise a power conferred upon Congress by the Commerce Clause as well as because in conflict with the provision which prohibits the States, without the consent of Congress, from laying any impost or duty.

In the *Passenger Cases* (7 How. 283) certain statutes of New York and Massachusetts imposing taxes on alien passengers arriving in the ports of those States were declared unconstitutional. The doctrine of *Gibbons* v. *Ogden* was approved, and the meaning of "intercourse" and "commercial intercourse" as used by Marshall in that case, was

extended to include the transportation of passengers.

In *United States* v. *Holliday* (3 Wall. 407), the Court held, that it was competent for Congress, under the power given it by the Commerce Clause to regulate commerce with the Indian Tribes, to forbid, and to punish as a crime, the sale of ardent spirits to an Indian. (Incidentally the Court held that whether certain Indians were still to be regarded as a tribe or as having ceased to hold the tribal relations was primarily a question for the political department of the government whose determination of it the Court would follow.)

In *Paul* v. *Virginia* (8 Wall. 168), the Court rendered a notable decision in holding that a fire insurance policy, made by a corporation of one state on property situated in another state, is not an article of commerce. Such policies, the opinion says (p. 183), "are not commodities to be shipped or forwarded from one state to another, and then put up for sale."

In *Almy* v. *California* (24 How. 169), a stamp duty imposed by the legislature of California upon bills of lading for gold and silver, transported from that state to any port or place outside of it, was a tax on exports and unconstitutional and void. The interest of this case resides in the fact that the Court practically identified a bill of lading with its commodity, holding that the intent to tax the export of gold and silver, which could not be carried out directly, could not be accomplished indirectly by taxing the bill of lading.

In *Pensacola Tel. Co.* v. *West, etc., Tel. Co.* (96 U. S. 1), a clear advance was made in the application of the Commerce Clause to the telegraph, upholding the constitutionality of the Act of July 24,

1866, providing for the construction of telegraph lines and securing to the government the use of the same for postal, military and other purposes. The opinion placed the telegraph among the instrumentalities of that "commercial intercourse" which, in *Gibbons* v. *Ogden,* Chief Justice Marshall had declared to be an element of commerce with the regulating power of Congress. It makes the following interesting statement respecting the growth of the application of the power to regulate commerce with the increase of commercial necessities and facilities:

> "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."

In *Nathan* v. *Louisiana* (8 How. 73), the Court sustained an act of the state legislature levying an annual tax on money and exchange brokers, holding that the tax was not in conflict with the right of Congress to regulate interstate commerce but merely a tax on citizens of the state for prose-

cuting a particular business or profession, and within the undoubted power of the legislature. It held that bills of exchange are not articles of commerce. Says the opinion (p. 81): "A bill of exchange is neither an export nor an import."

In *Pickard* v. *Pullman* (117 U. S. 34), the Court declared void a provision of the Legislature of Tennessee imposing a tax on sleeping cars run over railroads in Tennessee and not owned by the railroad on which they were used, in so far as it applied to the interstate transportation of passengers into or out of the state, in sleeping cars owned by the Kentucky corporation and leased to the Tennessee railroads.

In *Crutcher* v. *Kentucky* (141 U. S. 47), the Court declared express companies engaged in interstate business to be subject to the control of Congress under the Commerce Clause and pronounced void an act of the Legislature of Kentucky requiring a license from the agents of express companies not incorporated by the laws of that state.

In *Hooper* v. *California* (155 U. S. 648), the Court held the business of marine insurance not to be interstate commerce, and a contract therefor not to be an instrument of interstate commerce.

In *New York Life Ins. Co.* v. *Cravens* (178 U. S. 389), the business of life insurance was held not to be commerce. The opinion says (p. 401): "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the

'perils of the sea'. And we add, or against the uncertainty of man's mortality."

In the *Lottery Case* (188 U. S. 321), it was held that lottery tickets constitute commerce; that they are subjects of traffic among those who choose to buy and sell them; and that their carriage by independent carriers from one state to another is therefore interstate commerce which Congress may absolutely prohibit under its power to regulate commerce among the several states. This is in some respects the most notable case yet decided by the Supreme Court under the Commerce Clause. It possesses in certain respects a nearer resemblance to the present case than almost any other in the books, and we shall later examine it more fully (*infra*, pp. 31; 32-37; 41-42).

In *Buttfield* v. *Stranahan* (192 U. S. 470), the Court upheld as constitutional the act of March 2, 1897, entitled "An Act To Prevent The Importation of Impure and Unwholesome Tea", making it "unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption" to certain standards, provided by the act, and prohibiting such importation.

The learned Justice who rendered the opinion in the Circuit Court quotes with approval the following from the opinion of this Court in *Buttfield* v. *Stranahan* (*supra*) as cited by this Court in its opinion in *Boland* v. *United States*, 236 U. S. 216:

> The power to regulate commerce with foreign nations is expressly conferred upon Congress, and, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Consti-

tution. Lottery Case, 188 U. S. 321, 353-356 (23 Sup. Ct. 321, 47 L. Ed. 492); *Leisy* v. *Hardin,* 135 U. S. 100, 108 (10 Sup. Ct. 681, 34 L. Ed. 128). Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of *merchandise* [italics ours] brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude *merchandise* [italics ours] at discretion. This is illustrated by statutory provisions which have been in force for more than 50 years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States, and excluding such as did not equal the standards adopted. 9 Stat. at L. 237, c. 70, Rev. Stat., § 2933, U. S. Comp. Stat. 1901, p. 1936.

It will be noticed that the statement in this opinion as to the existence in Congress of "a pleanry power" of exclusion refers to the "exclusion of *merchandise*"; and, if, as we hope presently to show, the photographic-film positives involved in this inquiry are not merchandise ("commerce"), no inference from this opinion can be obnoxious to our present contention.

In *Adair* v. *United States* (208 U. S. 161), the Court held to be unconstitutional Section 10 of the Act of June 10, 1898, which made it a crime

against the United States unjustly to discriminate against the employee of an interstate carrier because of his being a member of a labor organization. The Court declared that, while the power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed, *the rules prescribed must have a real and substantial relation to, or connection with, the commerce regulated;* and that, while great and paramount, *the power cannot be exerted in violation of any fundamental right secured by other provisions of the national Constitution.*

In *International Textbook Company* v. *Pigg* (217 U. S. 91), the Court held that the International Textbook Company, engaged in teaching by correspondence, and having continuously an agent in the State securing scholars and receiving and forwarding the money obtained from them, was doing business in that State; and that intercourse or communication between persons in different States through the mails and otherwise, and relating to matters of regular and continuous business, such as teaching by correspondence, and the making of contracts relating to the transportation thereof, is commerce among the States within the Commerce Clause of the Federal Constitution.

In *United States Fidelity Company* v. *Kentucky* (231 U. S. 394), the above case of *International Textbook Company* v. *Pigg* was distinguished. There was involved a statute of Kentucky requiring commercial agencies engaged in the business of inquiring into and reporting upon the credit and standing of persons engaged in business in Kentucky to pay a license fee to the State. The statute was attacked as unconstitutional by a commercial agency which had its headquarters in Maryland and

local agents in various other States, including Kentucky. It was held not to be commerce.

In *Hipolite Egg Company* v. *United States* (220 U. S. 45), the Court had under consideration the Pure Food and Drug Act of June 30, 1906, passed for the purpose of keeping adulterated articles out of the channels of interstate commerce, or, if they enter such channels, of condemning them while in transit. The constitutionality of the act was sustained.

In the foregoing citations, we have, of course, made no pretext of referring to more than a small percentage of the vast number of cases dealing with this subject to be found in the books, or in the opinions of this Court. Our purpose has been merely to indicate in a general way the current of opinion upon cases involving commercial facts and conditions, that have reached this tribunal and been here discussed. The opinions to which we have called attention are fairly representative of controlling judicial judgment on the problems of foreign and interstate commerce which the development of the country has brought up for examination. Until recently, we believe, little argument would have been required in support of the proposition that the films with which the present case is concerned, under the conditions and circumstances herein, do not fall within the doctrines laid down in the opinions of this Court. Beginning, however, with the Lottery Cases (188 U. S. 321), there have been a few pronouncements here that are claimed to afford more or less support to the position of the Government in this case. We now invite the Court to a consideration of the principal cases of this character.

The Lottery Cases (*188 U. S. 321*).

The statute involved in these cases may be said to mark definitely the deliberate purpose of Congress for the first time to exercise its authority under the Commerce Clause for the accomplishment of an object not directly attainable by any course open to it under the Constitution. Argument was had at three successive terms and the majority opinion was rendered by five of the justices, four of them uniting in a dissenting opinion.

The constitutionality of the statute was challenged on three grounds: (1) That the suppression of lotteries is not an exercise of any power committed to Congress by the Constitution, and hence it is in contravention of the Tenth Amendment, already quoted. (2) That the sending of lottery tickets or policy slips does not constitute or evidence any transaction belonging to interstate commerce and is not within the scope of the power of the national government to regulate commerce among the states. (3) That the power to regulate lotteries and to permit or prohibit the sale of lottery tickets is exclusively within the jurisdiction of the police power reserved to the States.

It is to be noted here that the contest in the Lottery Cases was under the statutory provision touching interstate commerce, whereas here the question arises under that part of the law against picture films which relates to importation. This, however, can make no difference because the grant of power to Congress over interstate commerce is made in the same clause with that over foreign commerce and in identical language.

The Supreme Court in the recent case of the *W. U. Tel. Co.* v. *Kansas* (216 U. S. 1) declared

that the power of Congress over interstate commerce is as absolute as over foreign commerce.

In the *License Cases* (5 How. 504, 578), Mr. Chief Justice Taney said: "The power to regulate commerce among the several States is granted to Congress in the same clause and by the same words, as the power to regulate commerce with foreign nations, and is co-extensive with it."

In *Bowman* v. *Chicago, etc., Ry.* (125 U. S. 465, 482), Justice Matthews said: "The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive."

In *Crutcher* v. *Kentucky, supra,* Justice Bradley said: "It has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

And in *Pittsburg, &c., Coal Co.* v. *Bates* (156 U. S. 577, 587), Justice Field said: "The power to regulate commerce among the several states was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."

It was strongly and ably contended by the learned counsel opposed to the lottery statute that the doctrine laid down in *Paul* v. *Virginia, supra; Hooper* v. *California, supra,* and *N. Y. Life Ins. Co.* v. *Cravens, supra,* whereby it was held that policies of insurance, whether fire, marine or life, are not articles of commerce, should control the analogous case of lottery tickets; both being mere evidences of contracts made wholly within the boundaries of a state, and both being dependent upon chance and uncertain events.

The Court, however, refused to endorse this view, and *the entire decision turns on the fact that it*

finds lottery tickets to be property and the subject of traffic, and therefore commerce, and, when transported from one state to another, subject to regulation by Congress under the Commerce Clause, said regulation including the power to prohibit the traffic.

At the risk of seeming to spend too much time on the point, we desire to emphasize that the decision in the Lottery Cases finds the transportation of lottery tickets to be traffic, thus bringing the decision absolutely within the boundaries of the preceding cases under the Commerce Clause. Let it be borne in mind that this Court cannot, we respectfully urge, hold these picture fims to be justly excluded from importation on the authority of the Lottery Cases, unless it specifically finds that the films, in the owner's possession and "designed," not for traffic or sale or trade, in other words, *commerce*, but for "public exhibition" in the various states, are articles of commerce. That they are not so is, of course, apparent from the very statement.

But Congress, with its attention undoubtedly fixed on the alleged moral aspects of the lottery legislation, and presumably not carefully attending to the necessity that the exercise of police power by that body must be hitched to something that is actually and substantially "commerce," in enacting Section 10,416 to prevent prizefight picture exhibitions, neglected to observe this technical formality. *We find no such clause as "for the purpose of disposing of the same," or any equivalent expression indicating a destination in commerce. The commercial incident is neglected altogether and a bold and unqualified declaration is made that the films are excluded because they are*

"designed" to be used "for purposes of public exhibition," as appears from the language of the statute itself and from the debates that preceded its passage. There is nothing in the Lottery Cases decision that affords the slightest authority for sustaining this enactment. To sustain it, we respectfully submit, would require this Court to enter upon an entirely new field of Federal jurisdiction, and to sanction a plain invasion of the reserved police power of the States without the excuse that it is incident to an exercise of the power of Congress over foreign and interstate commerce.

The remarkable opinion in the Lottery Cases is in no respect more remarkable than in the evidence it affords of what we beg the indulgence of the Court for calling the reluctance felt by this Court in reaching its conclusion and in the anxious care it manifests, if we may say so without offence, that the decision shall not, after all, be regarded as too much of an authority. To begin with, your Honors required the cases to be argued three successive terms. Next, a decision was reached by only the barest possible preponderance, the Honorable Justices standing 5 to 4. Finally, the majority concluded their opinion with the following most significant restrictive paragraph:

> *"The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate com-*

> *merce; that under its power to regulate commerce among the several states Congress—subject to the limitation imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress"* (188 U. S., pp. 363-364—Italics ours).

When, in addition to the foregoing, we attend to this observation of the Court:

> "It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. *It will be time enough to consider the constitutionality of such legislation when we must do so"* (p. 362—Italics ours);

ought we not to regard the entire atmosphere of the Lottery Cases decision as amounting, in effect, to an invitation to be cautious, to the utmost extreme of caution, in sanctioning any subsequent legislation based on a clear, unmistakable and avowed advance yet further into the admittedly doubtful territory of which it is the outpost?

We make no apology for inserting here, as bearing with enormously greater force upon the situation now before this Court than even upon that pre-

sented when it was written, the following excerpt from the very able minority opinion in the Lottery Cases rendered by Chief Justice Fuller, concurred in by Justices Brewer, Shiras and Peckham:

(188 U. S., pp. 366, 367):

"Certainly the act before us cannot stand the test of the rule laid down by Mr. Justice Miller in the *Trade Mark Cases*, 100 U. S. 82, 96, when he said: 'When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States or with the Indian Tribes. If not so limited, it is in excess of the power of Congress.'

"But apart from the question of *bona fides*, this act cannot be brought within the power to regulate commerce among the several states, unless lottery tickets are articles of commerce, and, therefore, when carried across states lines, of interstate commerce; or unless the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody from one state to another.

"Mr. Justice Catron remarked in the License Cases, 5 How. 504, 600, that 'that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States'; and the observation has since been repeatedly quoted by this Court with approval.

"In *United States* v. *E. C. Knight Company*, 156 U. S. 1, 13, we said: 'It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union,

the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effect to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality. It will be perceived how far reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the General Government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police'. This case was adhered to in *Addyston Pipe and Steel Company* v. *United States,* 175 U. S. 211, where it was decided that Congress could prohibit the performance of contracts, whose natural effect, when carried out, would be to directly regulate interstate and foreign commerce.

"It cannot be successfully contended that either Congress or the State can, by their own legislation, enlarge their powers, and the question of the extent and limit of the powers of either is a judicial question under the fundamental law.

"If a particular article is not the subject of commerce, the determination of Congress that it is, cannot be so conclusive as to exclude judicial inquiry."

Hipolite Egg Co. v. *United States* (*220 U. S. 45*).

The doctrine in this case is not inconsistent with the claim here made that the films in the owner's possession and not intended for sale or traffic are not articles of commerce, on the ground that the eggs were shipped by Thomas and Clark from St. Louis, Mo., to Peoria, Ill., consigned to themselves, and were intended to be used in bakery manufac-

ture and not sold as eggs, but as components of manufactured articles, *for the reason that their clear destination was sale, trade and traffic,* thus obviously making them articles of commerce.

The learned District Judge seemed to regard this case as in point against the contention that is made here based on the continued ownership of the films by complainant at the time of entry and also at the time of exhibition. We think it quite clear that he is in error. It appeared in the Egg case that Thomas & Clark, a corporation, was both consignor of the eggs at St. Louis, Missouri, and consignee at Peoria, Illinois; that the transportation of the eggs from one State to the other was customary and habitual and in the regular line of the business of the corporation, the eggs being used in Peoria, mingled with other substances, to form bakery products which were regularly sold in commerce. We venture to think that such a case presents no difficulties whatever. It is clearly interstate traffic combined with transportation, and within the principles of various established cases. In the case at bar, complainant owns the films, has always owned them, and intends to continue to own them; they are not to be sold, traded or trafficked in, whether by themselves or in combination or mixture with any other article or commodity.

Hoke et al. v. *United States* (*227 U. S. 308*).

This case brought up for examination the statute of June 25, 1910, commonly known, and by its own terms authorized to be cited, as the "White Slave Traffic Act." The learned District Judge evidently considered this case a controlling precedent in the present inquiry, and seemed to find a large basis for his conclusion in the word "transportation",

which he quotes, in italics, from the opinion. In the argument below the District Attorney imported the same word into the discussion from the case of *Gloucester Ferry Co.* v. *Pennsylvania* (114 U. S. 196).

Thus there seems to be a feeling that a subtle function lurks in this word "transportation" whereby the difficulty that could not be resolved by the use of the word "commerce," which is the term employed in the Constitution, is overcome. The point is of considerable importance, and we beg the indulgence of the Court while we make some observations upon it.

We take it that the Court will endorse the proposition that neither Congress nor the Courts can enlarge the constitutional grants of power to Congress by the employment of words and terms not used in that instrument itself. From the principle that Congress has only the powers granted to it specifically by the Constitution and such others as are "necessary and proper" for the execution of the granted powers, it follows that any words used either by Congress or by the Courts as defining or describing a function of Congress must be either, on the one hand, synonyms and equivalents, or, on the other, sub-divisions in meaning, of the terms employed in the Constitution itself. If, for example, when the Constitution speaks of "commerce" the Legislature or the Court employs some other expression in referring to the same thing, that other expression cannot be anything but, first, a substitute for the Constitutional expression, or, secondly, a reference to some classification under that expression, not different in kind but in degree. There is no authority on earth, short of another Constitutional amendment, that can substitute for

the word "commerce" the word "transportation" and give to it any meaning greater than or different from that which the word "commerce" has in the Constitution. In other words, "transportation" may BE "commerce" or it may be LESS than "commerce"; it cannot be GREATER than or DIFFERENT from "Commerce." To call a thing, therefore, "transportation" is not to liberate it from the limitations of "commerce." Nothing is gained by affirming something of "transportation" which cannot be affirmed of 'commerce." If a given act is not "commerce" it cannot become such by first being called "transportation" and then, so as to slide over a difficulty which, we beg to insist is more than verbal, being assumed to be 'commerce."

It follows, therefore, that the word "transportation" cannot be properly used either as a substitute for "commerce" or as a subdivision of "commerce" without employing with it an adjective indicating its relation to 'commerce"; that is to say, the only permissible use of the word "transportation" in this connection must be in the form of the phrase "commercial transportation" or some equivalent expression.

The employment of the word "transportation," and the necessity of the just noted limitation upon it, are precisely paralleled by the history of the word "intercourse" as used by Chief Justice Marshall in *Gibbons* v. *Ogden* (9 Wheat. 1). It will be recalled that in that case, "commerce" was held to include "navigation". Marshall said: "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse." If he had stopped there, there might have been some ambiguity in the expression. But, that he intended by the word "intercourse" to denote something subordinate to "com-

merce", and part of "commerce", and not something different from "commerce" or more than "commerce", is indicated by his very next sentence: "It describes commercial intercourse between nations and parts of nations," etc. This is the sense in which the word was used and has always since been understood. Said Chief Justice Waite, in delivering the opinion of the Court in *Pensacola Tel. Co.* v. *West., etc., Tel. Co.* (96 U. S. at p. 9): "Since the case of *Gibbons* v. *Ogden* (9 Wheat. 1), it has never been doubted that *commercial intercourse* (Italics ours), is an element of commerce which comes within the regulating power of Congress."

We think, therefore, that we are fully justified in saying that the only kind of transportation subject to the regulation of Congress under the Commerce Clause is "commercial transportation." Neither the Constitution, nor the reason of the thing, nor any of the cases, authorize Congress to regulate under the Commerce Clause anything whatever unless it is first shown to be "commerce".

So that, we reiterate, no case that may be cited can sustain the statute we complain of under the conditions which, for the purposes of this argument, are admitted to exist here, UNLESS this Court begins by specifically finding that the importation of these films by the owner for the purpose of exhibition by himself, and not for sale, trade or traffic, is "commerce."

Let us inquire, in all sincerity, why this Court, in the Lottery case, was at such pains to find lottery tickets to be articles of commerce, if it was not upon the theory that the "transportation" which could subject them to regulation by Congress under the Commerce Clause was "*commercial* transportation"? It is apparent that the

Anti-Lottery statute would not have been declared unconstitutional unless the Court had found that lottery tickets were articles of commerce, "subjects," in the words of the opinion "of *traffic* among those who choose to *buy and sell them*." (Italics ours.) And, on the theory that prevailed in that decision, could a man have been convicted for merely carrying a lottery ticket across a state line with no *"purpose of disposing of the same"?*

But, may it please the Court, if, at the time of the Lottery Cases decision, this Court had understood the Commerce Clause to comprise "transportation" in the sense contended for in the opinion of the learned District Judge in this case, it would not have been necessary for your Honors to spend any time at all in determining whether lottery tickets were "commerce"; your Honors could, and unquestionably would, have decided the case upon the naked fact that lottery tickets had merely to be physically carried across a state line.

We submit that it is perfectly obvious that no authority exists in the opinions of this Court, at least down to and including the decision in the Lottery case, to authorize or excuse the use of the word "transportation" to enlarge the meaning and application of "commerce".

In view of the almost innumerable and complicated circumstances connected with commercial intercourse among the various States and with foreign countries, and of the development of nearly limitless aspects of the general question as to what constitutes commerce and what is involved in its regulation, we venture to suggest to the Court the extreme liability to error of all attempts to make any given case a direct authority in any other case unless there is a virtual identity in the facts

and the subject matters involved in the two cases. The important factors of various cases are so easily the basis of false analogies and unwarranted inferences, that cases which have been decided on narrow margins of presumption and supposed resemblance cannot justly be regarded as authority even in cases superficially similar. We do not find anywhere in the books a case on all fours with the case at bar. So far as we know, none exists where a question was presented in regard to any article or commodity like the question which is here presented with regard to these films. The analogy which the learned District Judge found between the Hoke and the Anthanasaw cases on the one hand, and the case now under consideration, on the other, is not sufficiently close, we respectfully submit, to be controlling. In the Hoke case the Assistant Attorney General of the United States argued (227 U. S. at p. 315): "The act is not an encroachment upon the police power of the States. It merely aids the States in the enforcement of their own laws on the subject of immorality;" and it may well have been that Congress, in its apparent assumption of a general belief in the immorality of puglistic encounters, placed this latter subject in the same category with prostitution and debauchery. But there is a very striking difference; a difference that Congress may have overlooked, and that this Court may well consider to be of sufficient importance to base upon it a distinction between the cases. As to prostitution and debauchery one universal sentiment of condemnation prevails throughout the United States. Public sentiment on the subject of prize-fights, boxing contests, and fistic encounters between trained athletes, on the other hand, exhibits, as everybody

knows, perhaps as great a diversity in the different sections of the country as can be found to exist on any other question within the cognizance of the police power. Most of the States have legislation on the subject. All of them, we believe, have outlawed the old-fashioned prize-fight. Some of them permit contests of four rounds, some of ten, some of twelve, some of twenty, and some of forty-five; while a few permit contests to a finish. Some States authorize a decision by the referee and some do not. Most of them have created Boxing Commissions of one sort or another to supervise the contests, a percentage of the receipts going into the coffers of the State. In most cases the law provides for the physical examination of contestants by physicians to determine their condition before they engage in the trial of strength and skill. Practically all of the States have established censorships to pass upon moving pictures of all contests as well as pictures of other sorts; and a few have prohibited such exhibitions.

In other words, while there is among the various States a wide difference as to the view entertained by public sentiment in regard to the moral character and social effect of these encounters, and a corresponding variation as to legal provisions against them, yet there is almost universal allowance of such contests in some form or other.

The effect of the statute, in so far as it concerns the opportunity of persons in one state to see pictures of such contests which have taken place in another state, is to substitute the will of Congress for the will of the community; to condemn what is not condemned by local laws. The result, therefore, in respect to exhibitions of this kind, is not, to use the language of the Assistant Attorney Gen-

eral in the Hoke Case, to aid "the States in the enforcement of their own laws on the subject of immorality"; but, on the contrary, to nullify the public sentiment, and fundamentally to modify the positive police law, of the majority of the States in the Union.

This is an aspect of the question not presented at all in the Hoke Case, nor, so far as we are informed, in any other case that has reached this Court.

It is obvious that the Court in the Hoke Case had in mind the discouragement of the *business* of prostitution conducted across state boundaries. The opinion says, on page 322, "* * * and surely, if the facilities of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the *systematic enticement to, and the enslavement in prostitution and debauchery of women, and more insistently of girls.*"

Not only the use of the words "systematic enticement", etc., in the quotation just made, but also the character of the other legislation referred to, strongly supports what we have said as to the attitude of the mind of the Court toward the *business* of interstate prostitution. Be it remembered that, "the facility of interstate transportation" was "taken away from the demoralization of lotteries" on the theory that lottery tickets were articles of commerce; and that it was taken away from "the debasement of obscene literature", from "the contagion of diseased animals and persons", and from "the impurity of food and drugs", upon familiar principles of constitutional law respecting the

power of Congress to keep clean and safe the channels of *interstate commercial transactions.*

This line of suggestion is emphatically reinforced by a consideration of the Athanasaw case, considered at the same time as the Hoke case (227 U. S. 326). There, it appears (at p. 328) that "Agnes Couch was a girl of seventeen years. She lived at Suwanee, Georgia; but, being in Atlanta in September, 1911, and seeing an advertisement by one Sam Massel for chorus girls, she applied at his office and signed a contract to appear with the Imperial Musical Comedy Company at the Imperial Theatre, Tampa, Florida, as a chorus girl at a salary of $20 a week for the first four weeks and $15 a week thereafter, she to room and board in the theatre. The theatre was operated by the defendants, and Massel acted as their booking representative at Atlanta. After she signed the contract Massel gave her a railroad ticket which had been provided by the defendants for that purpose. She arrived at Tampa about 6:30 A. M. and met the defendant Athanasaw at seven o'clock". The girl was then shown to her room by Anthanasaw, and next followed a course of conduct by him intended to accomplish his purpose not only to induce her to enter into illicit relations with him but to commit her to a life of immorality, of *commercialized vice.* The opinion quotes and approves the charge to the jury by the trial judge, from which (in view of the verdict of guilty) it clearly appears that the jury found the object of enticing the girl away to be to embark her on a career of prostitution, of selling her body for hire, as a business. Reviewing the evidence as to the influences brought to bear on the girl, the judge said (p. 331): "Was or was not it a condition that would neces-

sarily and naturally lead to *a life of debauchery of a carnal nature* (italics ours) relating to sexual intercourse between man and woman? * * * The charge of the indictment in substance is that they induced or influenced her to enter into a *life or condition of debauchery.*" (Italics ours.) The entire charge is practically given up to a discussion of the evidence as bearing upon the question whether the defendant had the intent of causing the girl to enter upon a life of professional sexual immorality, to become a prostitute.

When it is remembered, therefore, that in this Athanasaw case the defendant *purchased railroad tickets for the transportation of the girl from one State to another* for the purpose of embarking her upon a life and *business of commercialized vice,* it is not difficult to see that the court regarded itself as considering a case of *interstate commerce,* and that the opinion does not, and cannot, control the circumstances of the case at bar.

One of the cases cited in the opinion in the Hoke case (at p. 321), *U. S.* v. *Popper* (98 Fed. Rep. 423), was referred to by the District Attorney in the argument in the case below as a very strong one in support of the Government's position, or, rather, in opposition to the contention we are making. It is, perhaps, sufficient for us to refer to the language of Judge DeHaven in rendering the opinion, language, indeed, which the District Attorney himself quoted: "The power to regulate commerce includes the power to declare what property or things may be the subject of commerce." Let it be again noted by the court that what Judge DeHaven is talking about, and what all the courts are always talking about in all these cases, is COMMERCE. They invariably begin with, or assume,

some act or fact of commercial procedure. In the Popper case, for example, where an article to be used for the purpose of preventing conception was deposited with an express company in one State by one person and consigned to another person in another State, presumably a customer, the Court takes it for granted that the consignment was an act of commerce; and the effect of the words which concede in Congress the right to "declare what property or things may be the subject of commerce" is not to mean, and cannot possibly mean, what the District Attorney evidently thought they mean. To have the right to declare what may be a subject of commerce implies no authority whatever to make commerce out of an act that is not commerce. The important thing in the Popper case is, not that the object denounced was an article for the prevention of conception, but that, whatever it was, the Court found that the procedure which brought it under the inquiry of the Court was a commercial act. At the risk of seeming tedious, let us once more venture to repeat to the Court that, in our opinion, there is no case in the books that can serve as a precedent for excluding these picture films from being brought in as the complainant proposes to bring them in, UNLESS YOUR HONORS FIND THAT THE IMPORTATION OF THE FILMS BY THE OWNER FOR NO PURPOSES WHATEVER CONNECTED WITH SALE, TRADE OF TRAFFIC IS COMMERCE. For such a conclusion, we humbly but persistently submit, neither the Popper case nor any other case that we have been able to find affords any justification.

The argument that is here submitted, that the films sought to be entered by complainant are not articles of commerce, concededly depends upon the continued ownership of the films by the complain-

ant, their exhibition by himself, and their non-subjection to traffic, sale, or commerce. In this connection we quote the following observations from the opinion of the Circuit Court of Appeals in this case (*Weber* v. *Freed*, 224 Fed. Rep., p. 358):

> The declaration in the bill that the films in controversy are intended, not for sale, but solely for exhibition, is not controlling. Indeed, the allegations of the bill as a whole leave no room for doubt that the object of exhibiting the films is the large gains that are expected to accrue therefrom, and we see little, if any, difference between such an object and the sale or leasing of the films themselves. The plaintiff intends to sell the privilege of looking at the moving-pictures, and from the very nature of such films this is precisely the use for which they are designed. But in any event the films are articles of commerce, capable of being sold or leased, and the mere fact that the plaintiff has no present intention of using them for any other purpose than exhibition does not change their essential, material, character, or remove them from the class of tangible things that are the subject of "commerce" in any definition of that word.

In the first place, it is respectfully submitted that the Court is bound by the conditions imposed by the complainant upon his demand to be permitted to enter the films at the port of Newark. Throughout the proceedings in the District Court the case was treated as based upon these conditions. The position of the Government was analogous to a demurrer, the third reason urged by the District Attorney in support of his motion to dismiss the Bill of Complaint being that the bill "does not set forth facts sufficient to constitute a

cause of action"; and the opinion of the learned District Judge was expressly based upon the assumption that the films were to be exhibited under the personal direction of the complainant, and that they were to remain his property, not to be the subject of "traffic, sale or commerce".

In this situation, we submit, it is not permissible to treat the question as if it were free from this stipulation. We respectfully urge that the declaration *is* "controlling", and that neither the Circuit Court of Appeals nor this Honorable Court could, or can, render a decision in this matter otherwise than on the accepted basis that the films are not to be made the subject of "traffic, sale or commerce".

No hardship would be entailed on the Government by a subsequent failure of complainant to observe those conditions. If he were hereafter to make the films the subject of "traffic, sale or commerce" he would then at once become subject to prosecution under the statute. The situation would be precisely analogous to that which would be presented by the subsequent public exhibition of such films after an importation on condition that they were not "designed" for such exhibition.

And here a word on the construction of the statutory words "* * * which is designed to be used or may be used for purposes of public exhibition". There was a disposition on the part of the District Attorney in the Court below to construe the words "or may be used" as amplifying the class of films denoted by the words "designed to be used"; as though the meaning were that the statute runs against any films (of this character) whatsoever if it is *possible* to exhibit them, whether they were "designed" to be exhibited or not. But

such cannot possibly be the construction. If the importation of all such films that *could be* exhibited were the object sought to be prevented, the question whether the exhibition were "designed" or not would be utterly immaterial. Why make one class of prohibited films and then immediately follow it with another class which *includes* the first class? It would be like Sir Isaac Newton's famous provision in his study door for the ingress and egress of his cat and his dog, a small hole for the cat and a big hole for the dog, when both might have used the latter. Unquestionably what the statute means is what would have been indicated with perfect clearness by the language: "* * * which is designed to be used, or which shall actually be used, for public exhibition." The purpose is two fold: (1) to punish the importation of such a film where the importer *designs* to use it for public exhibition, whether he actually does so use it or not; and (2) to punish him, or somebody else, later on if such a film, having been originally imported for some other purpose (as, for example, for the purpose of making copies which might be sent abroad for use in exhibitions), should afterwards be *actually used* for public exhibition.

We think, therefore, the following language in the opinion of the learned Circuit Judge, as above quoted, to be a distinct begging of the question and without any bearing on the decision of the real inquiry before the Court: "But in any event the films are articles of commerce, *capable* (italics ours) of being sold or leased, and the mere fact that the plaintiff has no present intention for using them for any other purpose than exhibition does not change their essential, material, character, or remove them from the class of tangible things that

are the subject of 'commerce' in any definition of that word."

We venture also to believe the following language to be equally mistaken (*Ib.*): "Indeed, the allegations of the bill as a whole leave no room for doubt that the object of exhibiting the films is the large gains that are expected to accrue therefrom, and we see little, if any, difference between such an object and the sale or leasing of the films themselves. The plaintiff intends to sell the privilege of looking at the moving-pictures, and from the very nature of such films this is precisely the use for which they are designed."

It is unquestionably true that "the object of exhibiting the films is the large gains" expected; but whether or not the members of the Honorable Circuit Court of Appeals were able "to see any difference between such an object and the sale or leasing of the films themselves", the fact is that, as shown hereafter in this brief (pp. 57-60), the current of authority is uniformly in support of the proposition that such exhibitions do not constitute "commerce". If they do not, then, we respectfully submit, the above cited reasoning of the Circuit Court does not support its opinion.

While it is conceded that the power to "regulate" involves the power to prohibit, it must be borne in mind that the thing *regulated* is "commerce" and that the thing *prohibited* as a consequence of the power to regulate commerce must also be "commerce". The Constitution contains no specific grant to Congress of a power to prohibit the importation of things that do *not* constitute "commerce"; and if such a power is sought to be exercised it can be justified only as *incident* ("necessary

and proper") to some granted power. If, for example, Congress had attempted to prevent moving-picture shows of pugilistic encounters by invoking the authority given it to "lay and collect taxes, duties and imposts" (Const., Article I, Section 8, p. 1), and had levied a prohibitive duty of a thousand dollars a foot on the films, the act would at least have been clearly incident to the exercise of a definitely granted power.

Whatever confusion exists among the opinions in cases dealing with "commerce," one thing is absolutely clear in all of them and that is that there can be no commerce unless there are two or more parties involved. Commerce cannot exist where there is but one party. In other words, a man cannot sell to himself; a man cannot trade with himself; he cannot traffic with himself; he cannot exchange with himself; he cannot have commercial intercourse with himself, and there can be no transportation of a man by himself. So that had Congress prevented importation and transportation of the films in question for the purpose of sale, trade, traffic, exchange or commercial intercourse, the statute could not be attacked; it should appear equally clear that a man who imports or transports the films not for the purpose of sale, trade, traffic, exchange or commercial intercourse, is not engaged in commerce. If he brought the negatives here for the sole purpose of having positives made, his acts would not amount to commerce. So, too, having brought them here for the purpose of exhibiting them to the public, "under his personal management, control and supervision, and not for the purpose of traffic, sale or commerce" (see Bill of Complaint, Record, p. 2), his acts do not represent commerce. If it were otherwise, it would be commerce

for a person to bring the films into this country to show them on a screen in his own home for the entertainment of his immediate family, and it would also be commerce for newspapers to import into this country a "pictorial representation of any prize-fight or encounter of puglists, under whatever name," publish the same and transport the newspapers over the United States. Can it be successfully claimed that it is commerce when films are imported and transported for such purposes? If it cannot, then neither can it be successfully claimed that it is commerce if the films are brought in by the complainant for the purpose he has in mind. It is not the intention of the complainant to sell the films, or to give the right to produce them to any person or persons for all or any part of the United States, or to traffic with them in any way. His object is merely personally to exhibit them before the people of the United States. Inasmuch, therefore, as no other party is involved in that which the complainant purposes to do, to hold that his personal exhibition of the same involves commerce is to say that one can be engaged in commerce with himself.

We venture to suggest to the Court the following illustrations of the absurdities which, it is easily to be imagined, might result from the construction which the Government seeks to put upon the Commerce Clause in this case:

In its power to regulate commerce, to the extent of prohibiting the same, and which power cannot be reviewed no matter how wantonly exercised, Congress has the right to pass a law prohibiting the importation and transportation of law books "which are designed to be used or may be used" in the practice of the profession of the law, pro-

vided it do so where commerce is involved, and commerce would be involved if the importation or transportation was for the purpose of sale, trade, traffic, exchange or commercial intercourse. Who is foolish enough to contend that the law against the importation and transportation of law books could be made to apply against a firm of New York lawyers bringing law books from New York to Washington for use in an argument to be made in a case pending in the Supreme Court?

Under the same power Congress could prevent the importation and transportation of surgical instruments "which are designed to be used or may be used" in the practice of the profession of medicine, if the same were used as commerce. Who is there that will advance the argument that a Washington surgeon could not carry his instruments into New York for the purpose of operating upon a patient?

Who will contend that a lecturer could not carry with him the written manuscript, stereopticon slides and views of a lecture which he intended to deliver on a Chautauqua circuit embracing various states, because a law was in existence which prohibited the importation and transportation of manuscripts, stereopticon slides and views "which are designed to be used or may be used for purposes of public" lectures?

Suppose Congress forbade the importation and transportation of baseballs and bats, gloves and mitts, masks, bags for the bases, and tape or other means used for marking out the diamond, "which are designed to be used or may be used" in the playing of baseball; can it be contended by the most ardent advocate of the powers of Congress that a crime had been committed by a set of base-

ball players who went from state to state, carrying the paraphernalia referred to, though their sole purpose was to play baseball?

Can the playing of football be prevented, on account of the admitted fatality and casualty that every year attend its contests in nearly every state of the Union—the casualties numbering one hundred times as many as occur in pugilistic encounters—by forbidding the importation and transportation of footballs and nose guards? It is well known that football contests have been forbidden by the faculties of many institutions of learning in the country, and that public sentiment in many communities is almost fiercely against that form of amusement, regarding it as cruel and immoral. The case we suppose, therefore, is not so fanciful as it might at first seem to be.

We claim that the act of bringing in by the complainant of the films here in question is an act wholly incidental to the exhibition of motion pictures, as much so as would be the carrying of baseball bats and footballs across a state line for the purpose supposed in the illustrations.

This incidental characteristic of the transaction here in question may well be examined in the light of the familiar doctrine of cases like *Diamond Glue* v. *United States Glue Co.* (187 U. S. 611), *Williams* v. *Fears* (179 U. S. 270), *Hopkins* v. *United States* (171 U. S. 578), *Diamond Match Co.* v. *Roeber* (106 N. Y. 473), *United States* v. *Addyston Pipe and Steel Co.* (85 Fed. Rep. 271, and 175 U. S. 211), *Metropolitan Opera Co.* v. *Hammerstein* (162 App. Div., N. Y., 691), *Engel* v. *O'Malley* (219 U. S. 128), and many others.

(2) *The public exhibition of motion pictures is not commerce; and hence the photographic-film positives referred to in this case, being "designed to be used" for purposes of such exhibitions, are not Instrumentalities of Commerce.*

(1) A reference to the defintions heretofore given, and to the cases cited, will show that moving picture exhibitions are not comprehended under any of them. So far as definitions of commerce are concerned, either in the dictionaries or in the opinions of courts, we affirm with perfect confidence that none has ever been given which can, by any stretch of ingenuity, be made broad enough and accommodating enough to include the public exhibition of pictures produced by the use of photographic-films. *Such an exhibition is not a sale; it is not traffic; it is not trade; it is not "commercial intercourse"; it is not transportation, "commercial" or otherwise; it is not an incident to any of these; it has not a single feature of any one of the substantive elements of commerce according to authoritative definition.*

Every decision of the courts on the question whether exhibitions, theatrical or otherwise, are commerce, is, we believe, in favor of the contention that such exhibitions are not commerce.

In *People* v. *Klaw & Erlanger* (Ct. Gen. Sess., N. Y. Co., 1907), 55 Misc. 72, defendants were engaged in the business of owning, controlling and leasing of theatres, producing plays and entertainments on the stage, and booking of contracts for the production of plays. They were indicted for the violation of Subdivision 6 of Section 168 of the Penal Code of New York, which made it a conspiracy for two or more persons "to commit any act injurious * * * to trade or commerce * * *." The indictment averred that defendants owned or

controlled theatres throughout the country and arranged for booking attractions at such theatres; that they had agreed not to produce in their theatres attractions controlled by rival interests, and that in their booking contracts they bound their performers to either play in their theatres in cities where they had them or to remain out of such cities. Mr. Justice Rosalsky dismissed the indictment on the ground that the owning, controlling and leasing of theatres, the production of theatre entertainments and the booking of contracts for the production of plays were not acts of trade or commerce.

The case was not appealed.

In the case of *Metropolitan Opera Company* v. *Hammerstein*, 162 App. Div. (N. Y.) 691, which was an action for an injunction to prohibit the defendant from giving grand opera in New York, Philadelphia, Boston and Chicago for ten years according to the terms of his contract with the plaintiff, the contention was made by the defendant, in avoidance of this provision of the contract on his part, that the giving of grand opera in various states was interstate commerce, and that therefore the inhibition was repugnant to the statutes. He showed that the business consisted of

> (1) Engaging singers, conductors and other artists and purchasing scenery, costumes, producing rights and various operatic properties abroad, or in certain states of the United States, and bringing them into the United States or into other states; also the transmission of orders by telegraph or mail for tickets by persons in one state to plaintiff in another state, and the acceptance of such orders by the transmission of tickets from the latter state to the former state;
>
> (2) Producing opera in several states and sending or transporting the singers and various

employees, together with scenery, costumes and other properties, including tickets of admission, bill-posters, etc., from one state to another for the purposes of these performances; the aggregate value of the property thus transported approximating $350,000.

A motion was made for judgment on the pleadings pursuant to section 547 of the Code of Civil Procedure of the State of New York. This motion admitted the truth of every allegation of this defense. Mr. Justice Pendleton granted the motion for judgment on the pleadings and held that grand opera was not commerce. An appeal was taken to the Appellate Division, which unanimously affirmed the judgment on the opinion of Mr. Justice Pendleton. This opinion, after reviewing the definitions of "commerce" given in the lexicons and the cases, proceeds as follows (p. 695, *et seq.*):

"In *Matter of Oriental Society* (104 Fed. Rep. 975) it was held that a corporation incorporated for the purpose of giving theatrical representations was not 'trading or following mercantile pursuits.' In *Matter of Duff* (4 Fed. Rep. 519) a theatrical manager was held not to be a merchant or tradesman. In *People* v. *Klaw* (55 Misc. Rep. 72) it was held that plays and entertainments of the stage are not articles and commodities and that the business of owning, controlling and leasing theatres and producing plays or entertainments of the stage is not commerce. *The production of opera or other theatrical exhibitions before an audience in exchange for the price of the tickets involves none of the elements of trade or commerce as commonly understood. There is no dealing with an article of trade or commerce nor any use made of any of the instrumentalities of commerce. The holder of the ticket pays a certain price as a consideration for the privilege of experiencing the gratification of an artistic*

sense. Such a transaction is as far removed as possible from the commonly accepted meaning of trade or commerce. IF THE PRODUCTION OF OPERA IS TRADE OR COMMERCE, IT WOULD SEEM TO FOLLOW THAT EVERY MUSEUM WHICH EXHIBITS PICTURES, EVERY UNIVERSITY WHICH GIVES COURSES OF INSTRUCTION OR LECTURES, EVERY LAWYER WHO PREPARES A BRIEF, EVERY SURGEON WHO PERFORMS AN OPERATION, EVERY CIRCUS, MOVING PICTURE SHOW, EXHIBITING PUGILIST, ACTOR OR PERFORMER IS ENGAGED IN COMMERCE. *In the construction of statutes the usual and natural meaning is to be given to words, and it can scarcely be urged that a construction which would include the above in 'trade or commerce', would give to the words their usual and natural meaning.* IF THE PRODUCTION OF OPERA IS NOT COMMERCE, THE FACT OF ITS PRODUCTION, SOMETIMES AT ONE PLACE AND SOMETIMES AT ANOTHER, DOES NOT MAKE IT SO."

If the exhibition of moving pictures is not commerce, then the films used to produce the pictures, if not made the subject of traffic, sale, or some transaction of commerce, are not instrumentalities of commerce.

Wherefore, may it please the Court, we respectfully submit that the final decree entered herein on the seventh day of September, 1915, dismissing the Bill of Complaint, should be reversed.

TOWNE & SPELLMAN,
Solicitors for Complainant and Appellant.

CHARLES A. TOWNE,
BENJAMIN F. SPELLMAN,
Of Counsel.

Office Supreme Court, U. S.
FILED
DEC 1 1915
JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 644.

L. LAWRENCE WEBER,
Complainant and Appellant,
vs.

FREDERICK S. FREED, DEPUTY COLLECTOR OF UNITED STATES CUSTOMS IN CHARGE OF PORT OF NEWARK, NEW JERSEY,
Defendant and Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

APPELLANT'S REPLY BRIEF.

CHARLES A. TOWNE,
BENJAMIN F. SPELLMAN,
Of Counsel for Appellant.

The Evening Post Job Printing Office, Inc., 134 Nassau St., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1915.

L. LAWRENCE WEBER, Complainant and Appellant, vs. FREDERICK S. FREED, Deputy Collector of United States Customs in charge of the Port of Newark, New Jersey, Defendant and Appellee.	No. 644.

APPELLANT'S REPLY BRIEF.

We respectfully submit that in his brief, the learned Assistant Attorney General has failed to realize the importance of the distinction between the statute in question and the legislation concerning "articles of commerce" and "instrumentalities of commerce" referred to in the cases he cites.

Congress has attempted by the law in question to prevent the "public exhibition" of films representing a pugilistic encounter or prize fight by making it unlawful to import the films into this country or to transport them among the states. It describes films which are "designed to be used or may be used for purposes of public exhibitions".

In other words, though the films may be "designed" for private use by the importer, if they "may (can) be" used for the purpose of "public exhibition", they come within the condemnation of the law in question. It is therefore the "public exhibition" of the pictures which Congress has attempted to prevent. This is not denied by the Government.

It is likewise conceded that Congress has attempted to enact this law under the Commerce Clause of the Constitution. The appellant's contention is that Congress has not the power, under the commerce clause, or under any other of its enumerated powers, to prevent "public exhibition", for the reason that "public exhibitions", of any kind, are not commerce.

We respectfully urge that the regulation or prevention of "public exhibitions" of any character come within the police power reserved in the states, and that Congress cannot make laws respecting "public exhibitions". The constitutionality of the laws passed by two of the states in respect to the character of "public exhibitions" of films, in their respective states, has been recently upheld by this Court (Mutual Film Corporation *v.* Industrial Commission of Ohio, 236 U. S. 230; Mutual Film Corporation of Missouri *v.* Hodges, Governor of the State of Kansas, 236 U. S. 248).

Appellant does not dispute the proposition that the right of Congress to regulate commerce includes the right to prohibit commerce. Nor does he dispute the proposition that legislation enacted under the commerce clause may, incidentally, carry with it the exercise of police power. The Government on its part should concede that Congress cannot pass a law, under the guise of the commerce clause, which has for its object the exercise of police power, and nothing else.

The learned Assistant Attorney-General says:

> "The articles imported are still susceptible of sale and traffic, and the importer may change his mind after importation; and also they may be sold on involuntary legal process, even though the immediate purpose of the importer may have been to refrain from sale. Neither the purpose for which articles are imported or transported nor the use to which they are to be put after transportation is, however, any test of the commercial character of the transaction. It is not what is done or is to be done with these films after they reach the United States, but it is the intrinsic nature of the articles and the act of transporting or introducing them here from abroad for any purpose that brings them within the purview of the commerce clause."

He also states in another part of his brief:

> "The appellant tries to distinguish between importation for sale and importation for public exhibition. The distinction is decidedly filmy."

No exception is taken to his characterization of the proposition. It is regrettable, however, that he does not see the distinction. His failure to understand it is what has led him into error. We do not complain of the action of Congress in preventing the sale of or traffic in these films, but we do complain of the attempt of Congress to pass a law which prevents "public exhibitions" of the films. The intention of the importer is necessarily of consequence. We concede that any person who brings the films into this country or transports them among the states for the purpose of sale or traffic, or for any other purpose which Congress has the right to prevent under the commerce clause, is guilty of an offense; but we respectfully urge that a person who imports or transports the films for the purpose of

"public exhibitions" is not guilty of an offense, for Congress cannot regulate or prohibit "public exhibitions," as "public exhibitions" are not commerce. The allusions in the brief that "the importer may change his mind after importation"; * * * "they may be sold on involuntary legal process, even though the immediate purpose of the importer may have been to refrain from sale" are matters which can be dealt with should occasion arise, either in this case or in any other case, and we are unwilling to admit that the Government is impotent to take care of such infractions of the law.

We submit that the only question here to be dealt with is whether "public exhibitions" are commerce, or instrumentalities of commerce. We again refer to the language of Mr. Justice Pendleton in Metropolitan Opera House *v.* Hammerstein, 162 App. Div. (N. Y.) 691, which opinion was adopted by the five judges of the Appellate Division in affirming the decision. Among other things he says (see Appellant's main brief, last page):

> "IF THE PRODUCTION OF OPERA IS TRADE OR COMMERCE, IT WOULD SEEM TO FOLLOW THAT EVERY MUSEUM WHICH EXHIBITS PICTURES, EVERY UNIVERSITY WHICH GIVES COURSES OF INSTRUCTION OR LECTURES, EVERY LAWYER WHO PREPARES A BRIEF, EVERY SURGEON WHO PERFORMS AN OPERATION, EVERY CIRCUS, MOVING PICTURE SHOW, EXHIBITING PUGILIST, ACTOR OR PERFORMER, IS ENGAGED IN COMMERCE."

All that the appellant is attempting to do is to give a "public exhibition" on a screen of the actions of certain human beings. He intends to give to the people of the United States a pictorial view of something which took place in Havana, Cuba. The films are merely the instrumentalities of the "public exhibition", similarly as the paintings of an artist are the instrumentalities of a "pub-

lic exhibition" of his work. It might as well be contended that Willard and Johnson could, under the commerce clause, be kept out of the United States because they are the instrumentalities by which a "public exhibition" of a prize fight could be given. Of course each State has the right to say whether prize fights may be given within its domain. But is it within the power of Congress, under the commerce clause, to prevent the landing of these men because they have it in their power to produce as a reality the scenes depicted by the films which the appellant is attempting to import? So, too, can Congress, under the commerce clause, prevent two football elevens, or two baseball teams, from entering this country or traveling among the States for the reason that they are capable of giving a "public exhibition" of football or baseball? If Congress has not the right, under the commerce clause, to keep out of this country Willard and Johnson, the football players or baseball players, on the ground that their coming here is "designed" to give a "public exhibition" of a pugilistic contest, a football game or a baseball game, can films representing a pugilistic contest, a football game or a baseball game be refused entrance into this country on the ground that they are "designed to be used or may be used for purposes of public exhibition"? The appellant does not intend to part with the films.

The statute in question was designed against "public exhibitions", and Congress attempted to effect such purpose by excluding the films which are the instrumentalities of such "public exhibitions".

The Government refers to the cases of Buttfield *v.* Stranahan, 192 U. S. 470; "Abby Dodge", 223 U. S. 166; Brolan *v.* United States, 236 U. S. 216; and, Hipolite Egg Co. *v.* United States, 220 U. S. 45.

None of these cases sustains the Government's contention, as in each of these there is involved an "article of commerce".

In the Buttfield case the statute under consideration made it unlawful to import any merchandise as tea, which is inferior in purity, quality and fitness for consumption. Surely tea is an article of commerce.

In the "Abby Dodge" case, there was involved an act to regulate the landing, delivery, cure and sale of sponges, an article of commerce.

In the Brolan case there was involved opium, an article of commerce.

In the Hipolite Egg Case there was involved the Pure Food and Drug Act, articles of commerce.

In this case, according to the allegations of the bill of complaint all of which are admitted, there is involved the question of "public exhibitions" and nothing else.

The Government has failed to cite a single case to show that "public exhibitions" are articles of commerce, or instrumentalities of commerce.

The appellee's brief gives the following as one of the points:

> "Prize fight films are articles of commerce and their importation for public exhibition is commercial intercourse."

Under this point several authorities appear but not one sustains the contention that "public exhibitions" are "commercial intercourse". The words "commercial intercourse", in connection with the commerce clause, were first used by Chief Justice Marshall in Gibbons *v.* Ogden, 9 Wheat. 1. No language which he employs in connection with "commercial intercourse" can be stretched to cover "public exhibitions". Nor can any language which has been used in the numerous authorities which

followed Gibbons *v.* Ogden be construed to include in "commercial intercourse" "public exhibitions".

"Public exhibitions" are not articles of commerce nor instrumentalities of commerce, and, that being so, Congress has no right to enact a law which prevents one from bringing into this country an article which is intended purely for purposes of "public exhibition" by the owner himself, and not for sale, trade or traffic.

Respectfully submitted,

TOWNE & SPELLMAN.

CHARLES A. TOWNE,
BENJAMIN F. SPELLMAN,
Of Counsel.

INDEX AND SUMMARY.

	Page.
THE QUESTION INVOLVED	1
ARGUMENT	2–10
I. The contention that Congress can not prohibit the importation of motion-picture films intended for purposes of exhibition is frivolous, and the Court should, therefore, decline jurisdiction	2–3
II. The power of Congress to regulate commerce with foreign nations includes the prohibition of the introduction, importation, or transportation from abroad of any tangible object which may be used for any gainful purpose, regardless of the use which the importer himself intends to make of it. Prize-fight films are articles of commerce; and their importation for public exhibition is commercial intercourse	3–10
CONCLUSION	10

AUTHORITIES CITED.

	Page.
Brolan v. *United States* (1915), 236 U. S. 216	3, 6
Buttfield v. *Stranahan* (1904), 192 U. S. 470	3
Covington, etc., Bridge Co. v. *Kentucky* (1894), 154 U. S. 204	6
Debs, in re (1895), 158 U. S. 564	4
Doyle v. *Continental Ins. Co.* (1876), 94 U. S. 535	9
Hipolite Egg Co. v. *United States* (1911), 220 U. S. 45	7
Hoke v. *United States* (1913), 227 U. S. 308	5, 8
Interstate Commerce Commission v. *Brimson* (1894), 154 U. S. 447	3
Lottery Case (1903), 188 U. S. 321	3, 9
Mutual Film Corporation v. *Kansas* (1915), 236 U. S. 248	4
Mutual Film Corporation v. *Ohio Industrial Commission* (1915), 236 U. S. 230	4
Northern Securities Co. v. *United States* (1904), 193 U. S. 197	10
Pipe Line Cases (1914), 234 U. S. 548	6
The Abbey Dodge (1912), 223 U. S. 166	3
United States v. *Marigold* (1850), 9 How. 560	7
United States v. *Motion Picture Patents Co. et al* (1915), 225 Fed. 800	4
Whitney, Edward B., The Latest Development of the Interstate Commerce Power, Michigan Law Review (1903), vol. I, p. 614	8

In the Supreme Court of the United States.

L. LAWRENCE WEBER, APPELLANT,
v.
FREDERICK S. FREED, DEPUTY COLLECTOR of United States customs, in charge of the port of Newark, N. J. } No. 644.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR THE APPELLEE.

THE QUESTION INVOLVED.

The sole question involved upon this appeal, assuming that this Court has jurisdiction, is the constitutionality of that portion of the Act of July 31, 1912, c. 263 (37 Stat. 240), which makes it unlawful for any person "to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition."

The deputy collector of customs at Newark, N. J., has refused to permit the entry of certain film positives sought to be imported from Cuba by the appel-

lant of a pugilistic contest which occurred at Habana, Cuba, on April 5, 1915, between one Jess Willard and one Jack Johnson. It is not contended that this contest was not a prize fight, or encounter of pugilists, within the meaning of the statute. If the statute is valid, it is the duty of the deputy collector to exclude these films; and if so, there is admittedly no cause of action.

It is alleged in the bill, paragraph fourth (Record, p. 2), paragraph twelfth (Record, pp. 3, 4), that the appellant sought to import these films "for the purpose of publicly exhibiting the same in the United States, under his personal management, control, and supervision, and not for the purpose of traffic, sale, or commerce." An injunction is sought to restrain the collector from excluding the films in question.

ARGUMENT.

I.

The power of Congress to regulate commerce with foreign nations includes the power to prohibit. The contention of appellant that this power is limited to the exclusion from the United States of property intended for sale is clearly foreclosed by the decisions

of this Court, and this Court will decline jurisdiction of the case as "in substance so wholly wanting in merit as to be frivolous" and "wholly unsubstantial."

Brolan v. *United States* (1915), 236 U. S. 216, 218, 221;

Buttfield v. *Stranahan* (1904, 192 U. S. 470;

The Abby Dodge (1912), 223 U. S. 166, 176.

II.

The power of Congress to regulate commerce with foreign nations includes the prohibition of the introduction, importation, or transportation from abroad of any tangible object which may be used for any gainful purpose, regardless of the use which the importer himself intends to make of it. Prize-fight films are articles of commerce; and their importation for public exhibition is commercial intercourse.

"Commerce," as used in the Constitution, "comprehends traffic, navigation, and every species of commercial intercourse or trade." *Interstate Commerce Commission* v. *Brimson* (1894), 154 U. S. 447, 470. *Lottery Case* (1903), 188 U. S. 321, 352.

The power of Congress over interstate and foreign commerce embraces legislation on the following subjects: (*a*) The highways of such commerce; (*b*) the instrumentalities of such commerce; (*c*) the methods by which such commerce is carried on; (*d*) the agents of such commerce; (*e*) the subjects or articles of such commerce; (*f*) the persons taking part in such commerce.

When the Constitution was framed motion-picture films were undreamed of; but the Commerce Clause " operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." *In re Debs* (1895), 158 U. S. 564, 591.

Congress, by the statute in question, has excluded every film which is " designed to be used *or may be used* for purposes of public exhibition "; in other words, it has classified the kind of films which it intends to exclude. The exclusion, however, is intended to prevent not only the exhibition, but also the sale of, or traffic in, films.

The appellant claims that because in the particular case he does not intend to sell the films, *therefore* the films are not " articles of trade or traffic," or " subjects of commerce."

Films, however, are articles susceptible of purchase and sale and are commonly bought and sold. They are, therefore, " articles of trade and the subject of large interstate transactions." [Judge Dickinson, in *United States* v. *Motion Picture Patents Co. et al.,* decided October 12, 1915, in the District Court of the United States for the Eastern District of Pennsylvania, 225 Fed. 800, 803.] See also *Mutual Film Corporation* v. *Ohio Industrial Commission* (1915), 236 U. S. 230; *Mutual Film Corporation* v. *Kansas* (1915), 236 U. S. 248. They do not cease to be " articles of commerce " simply

because in any particular instance the importer does not intend to sell.

" The public exhibition of motion pictures is not commerce," says the appellant. Even if true, the statement is not in point—the question being not one of exhibition itself, but of importation for exhibition—two very distinct things.

It is the importation of the films which Congress has forbidden. " To bring or cause to be brought into the United States " such articles is " commercial intercourse."

The appellant tries to distinguish between importation for sale and importation for public exhibition. The distinction is without substance. In either case the transaction enables the importer to derive a profit from the article imported. Such profit is obtained in the one instance by the transfer, for a consideration, of title to the property; in the other, by granting to the general public, for a consideration, the right to observe the production of articles (here film pictures) to which title is retained by the importer for that purpose. The White Slave Law, so far as it is directed against transportation of women for use as a source of profit, is analogous to the statute at bar; for in both cases the object of the transportation is the use of the thing or person transported, as capital from which income is to be derived, rather than as an object of sale. *Hoke* v. *United States* (1913), 227 U. S. 308.

It is unnecessary to consider the many hypothetical cases put by the appellant or to decide whether the power of Congress extends to the prohibition of the introduction of articles *capable solely of personal use or consumption* by their owner. (See the *Pipe Line Cases* (1914), 234 U.S. 548, 562.) Such is not the case at bar. Even though the immediate purpose of the importer may have been to refrain from sale, the articles imported are still susceptible of sale and traffic, and the importer may change his mind after importation; and also they may be sold on involuntary legal process. Neither the purpose for which articles are imported or transported, nor the use to which they are to be put after transportation, is, however, any test of the commercial character of the transaction. It is not what is done or is to be done with these films after they reach the United States, but it is the intrinsic nature of the article and the act of transporting or introducing them here from abroad *for any purpose* that brings them within the purview of the Commerce Clause.

The appellant contends that "there can be no commerce unless there are two or more parties involved. Commerce can not exist where there is but one party." This broad statement is, of course, not true either in fact or in law. (See *Pipe Line Cases* (1914), 234 U. S. 548; *Covington, etc., Bridge Co.* v. *Kentucky* (1894), 154 U. S. 204.)

The power of Congress to exclude articles from foreign trade is "plenary," as stated in the *Brolan*

case; but even if not so "plenary," its power is at least sufficient to forbid the introduction of prize-fight films, to keep them "out of the channels of commerce," on the ground that in the opinion of Congress they should be thus declared to be "illicit articles—articles which the law seeks to keep out of commerce," * * * "articles which are outlaws of commerce," in the words of this Court in *Hipolite Egg Co.* v. *United States* (1911), 220 U. S. 45, 54, 57, 58.

The appellant contends that, there being no national police power in the United States, Congress has no right to brand prize-fight films as such "contraband of commerce."

But it is certain that even if Congress be not expressly vested with such national police power, and even if Congress expressly intended to legislate to supply deficiencies in the exercise of police power by certain States, yet it is vested with express and plenary power to regulate commerce with foreign nations, and may so regulate, without supervision of its impelling reasons by this Court.

Congress alone is judge of the necessity of exclusion from foreign trade. *United States* v. *Marigold* (1850), 9 How. 560, 566, 567:

> Every subject falling within the legitimate sphere of commercial regulation may be partially or wholly excluded, when either measure shall be demanded by the safety or by the important interests of the entire nation. * * * The power once conceded, it may

> operate on any and every subject of commerce to which the legislative discretion may apply it.

While the Commerce Clause empowered Congress to regulate commerce, not public morals, the second may, nevertheless, be incidental to the first. It is no objection to the validity of Congressional legislation that an article prohibited by Congress in the legitimate exercise of its commerce power might also be prohibited by the States in the exercise of their police power.

As was said in *Hoke* v. *United States* (1913), 227 U. S. 308, 320, 323:

> If the statute be a valid exercise of that power, how it may affect persons or States is not material to be considered.
>
> * * * * *
>
> The principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.

See the able article on *The Latest Development of the Interstate Commerce Power,* by Edward B. Whitney, in *Michigan Law Review,* Vol. I, p. 614 (1903).

The appellant's contention that this Court can inquire into the reasons impelling Congress to ex-

clude prize-fight films is unsupportable. As was said in *Doyle* v. *Continental Ins. Co.* (1876), 94 U. S. 535, 541:

> The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable suggestion, which can not be applied to the affairs of life. If the act done * * * is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

See also the *Lottery Case, supra*, where this Court said (p. 363):

> If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons* v. *Ogden,* when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They

> are the restraints on which the people must often rely solely, in all representative governments."

And as was said, also, in *Northern Securities Co.* v. *United States* (1904), 193 U. S. 197, 337, "as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a Government of laws, and not of men."

The appellant's view that because all States in the country do not agree upon the subject of the viciousness of prize fights and prize-fight exhibitions, therefore Congress may not act, is untenable; for such reasoning would equally deny the power of Congress over the liquor traffic, regarding which 29 States now hold views directly opposite to the remaining 19.

CONCLUSION.

The decree of the district court should be affirmed, or the appeal dismissed for want of jurisdiction.

CHARLES WARREN,
Assistant Attorney General.

NOVEMBER, 1915.

○